No. 88-317-CFH
Status: GRANTED

Title: Jack R. Duckworth, Petitioner
v.
Gary James Eagan

Docketed:
August 22, 1988

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Spear,Robert S.

Counsel for respondent: Eisenberg,Howard B.

Entry	Date	Note	Proceedings and Orders
1	Aug 22 1988	G	Petition for writ of certiorari filed.
2	Sep 16 1988	X	Brief of respondent Gary James Eagan in opposition filed.
3	Sep 16 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Sep 21 1988		DISTRIBUTED. October 7, 1988
5	Oct 11 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
6	Oct 11 1988		Petition GRANTED.
			**********
7	Oct 17 1988	G	Motion of respondent for appointment of counsel filed.
8	Oct 18 1988		DISTRIBUTED. October 28, 1988. (Motion of respondent for appointment of counsel).
9	Oct 31 1988		Motion for appointment of counsel GRANTED and it is ordered that Howard B. Eisenberg, Esquire, of Carbondale, Illinois, is appointed to serve as counsel for the respondent in this case.
12	Nov 11 1988		Record filed.
		*	Certified copy of C. A. Proceedings received.
11	Nov 14 1988		Order extending time to file brief of petitioner on the merits until December 2, 1988.
13	Nov 19 1988		Record filed.
		*	Certified copy of original pleadings and one copy of original record received.
14	Dec 1 1988		Brief amicus curiae of United States filed.
15	Dec 2 1988		Joint appendix filed.
16	Dec 2 1988		Brief of petitioner Jack R. Duckworth filed.
17	Dec 7 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Dec 29 1988		Brief of respondent Gary James Eagan filed.
18	Jan 9 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Jan 28 1989		Reply brief of petitioner Jack R. Duckworth filed.
21	Feb 3 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 29, 1989. (2ND CASE)
22	Feb 15 1989		CIRCULATED.
23	Mar 29 1989		ARGUED.

88-317

NO.

IN THE

Supreme Court of the United States

October Term, 1987

JACK R. DUCKWORTH, Warden,

Petitioner,

v.

GARY JAMES EAGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Seventh Circuit's formalistic and hyper-technical application of *Miranda*, prohibiting the use of objectionable "magic words" in an advice of rights, is in conflict with the decisions of this Court and a majority of Circuits which have determined this issue.

Whether the Seventh Circuit's determination that an incriminating statement, following a constitutionally adequate *Miranda* warning, was tainted and inadmissible by reason of the first advice of rights, is in conflict with the decisions of the this Court and a majority of Circuits which have determined this issue.

LIST OF PARTIES

The Parties to this Petition are Petitioner Jack R. Duckworth, Superintendent, Indiana State Prison, Michigan City, Indiana and Respondent, Gary James Eagan.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Jack R. Duckworth, respectfully prays the Court issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit (hereafter the "Seventh Circuit") entered in Cause Number 86-2178 on March 22, 1988, the petition for rehearing having been denied on May 24, 1988. The Seventh Circuit decision reversed and remanded this cause to the United States District Court for the Northern District of Indiana, South Bend Division (hereafter the "District Court").

OPINIONS BELOW

The decision of the Seventh Circuit denying Petitioner's request for Rehearing in Banc issued on May 24, 1988. A copy

of that Order has been included in the appendix at page A-1. The decision of the Seventh Circuit reversing and remanding this cause to the District Court issued on March 23, 1988. A copy of the Circuit Court's opinion is included in the appendix at page A-3. The decision of the District Court was entered on June 26, 1986. A copy of the Memorandum and Order of the District Court is included in the appendix at page A-49.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 17 of this Court. The decision of the Seventh Circuit was entered on March 22, 1988. This decision was reviewed on May 24, 1988, when the Seventh Circuit denied Petitioner's Petition for Rehearing in Banc. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c) and Rules 20.2, Rules of the Supreme Court of the United States, as measured from the issuance of the denial of Petitioner's Petition for Rehearing in Banc as provided by Rules 20.4, Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> (emphasis added.)

28 U.S.C. § 2241(c) provides in pertinent part:

> (e) The writ of habeas corpus shall not extend to a prisoner unless —
>
> (3) he is in custody in violation of the Constitution or laws or treaties of the United States; or . . .

28 U.S.C. 2254(d) provides in pertinent part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opionion, or other reliable and adequate written indicia, shall be presumed to be correct . . .

STATEMENT OF THE CASE

A. Nature Of The Case

The Respondent, Gary James Eagan, (hereafter Eagan) is currently incarcerated at the Indiana State Prison, Michigan City, Indiana, and has been so incarcerated at all times while this matter was before the Courts. Eagan filed a petition for writ of habeas corpus in District Court pursuant to 28 U.S.C. § 2254. There were two primary issues raised in Respondent's petition. First, whether his right to be free of self-incrimination was impinged upon. Second, whether he was denied due process by the Court's failure to fully instruct the jury.

Eagan complained that his two statements to the police which were admitted at trial were obtained in a constitutionally infirm manner. Specifically, Eagan contends the advice of his rights on the waivers was inadequate and misleading. Only this issue is raised in this petition, as the Circuit Court's decision to reverse and remand rested on this issue alone.

B. Course Of Proceedings.

On December 7, 1982, Eagan was convicted, by a jury, of attempted murder and sentenced to a term of imprisonment of thirty-five (35) years. This conviction was upheld by the Supreme Court of Indiana in a decision entered August 2, 1985 and reported as *Eagan v. State*, 480 N.E.2d 946 (Ind. 1985). Eagan filed his petition for writ of habeas corpus with the District Court on Feburary 3, 1986. A Return to Order to Show Cause was filed by Petitioner on March 6, 1986. Eagan's petition was denied by Order of the District Court on June 26, 1986.

A Notice of Appeal was filed by Eagan, and on July 14, 1986, the District Court issued a Certificate of Probable Cause. A motion for appointment of counsel was filed by Eagan and counsel appointed by Order of the Circuit Court on December 17, 1986. Eagan's Court-Appointed Counsel filed his brief on or about February 19, 1986. Petitioner's brief was filed on March 30, 1987. On June 2, 1987, oral argument was held.

The Circuit Court's decision reversing and remanding the decision of the District Court was entered on March 22, 1988. Petitioner moved for a Rehearing in Banc on April 1, 1988. Eagan's response to the motion for rehearing in Banc was filed on or about April 19, 1988. On May 24, 1988, the Circuit Court entered the Order denying Petition's motion for Rehearing in Banc. This Petition for Writ of Certiorari results.

C. Facts.

On May 16, 1982, Eagan telephoned the Chicago police and talked to an officer with whom he was acquainted. The officer met Eagan at his apartment and Eagan told him that he had found a dead naked woman along the shore of Lake Michigan in Indiana. Eagan led the police to the area where the body was found.

Upon approaching the victim it was apparent she was not dead. The victim, seeing Eagan, exclaimed: "Why did you stab me?" At trial the victim stated she was picked up by Eagan and

some companions in South Chicago, Illinois and taken to the beach area where she had sexual relations with several of the men. Later, the victim refused to have sex with Eagan, who then stabbed her nine times and left her lying naked in the wooded area near the lake.

The matter was turned over to the Hammond Police Department (Indiana) and at approximately 11:14 a.m. on May 17, 1982, Eagan was questioned by them as a witness. Eagan was read aloud and then asked to read and sign the following advice of rights and waiver form prior to the questioning:

"VOLUNTARY APPEARANCE;
ADVICE OF RIGHTS
YOUR RIGHTS

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER

I, [Gary Eagan] have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers of the Hammond, Indiana Police Department, In[sic] regard to an investigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so.

Prior to any questioning, I was furnished the above statement of my rights at [11:14 a.m.] on [5-17-82] at [H.P.D.] by (time) (date) (place) [ROGER

RASKOSKY & THOMAS BAUGHMAN] of the Hammond Police Departmet. I have (read)(had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. no promises or threats have been made to me and no pressure of any kind has been used against me.

Signed [Gary J. Eagan]

[11:16a.m. 5/17/82 H.P.D.]
(time) (date) (place)

Witness [Sgt. Roger A. Raskosky]

Witness _____

Okey [sic] to take your photo: [Gary Eagan]

Date _____Time _____"

Following this advice of rights, Eagan gave the police an exculpatory statement consistent with the original story Eagan told the Chicago Police the night before.

Eagan remained in police custody and was questioned again twenty-nine (29) hours later at 4:21 p.m. on May 18, 1982. He was orally advised of and asked to read and sign the following advice of rights and waiver.

"WAIVER AND STATEMENT

HAMMOND POLICE DEPARTMENT
CASE # [82-14893]

DATE [5-18-82] PLACE [H.P.] TIME STARTED [4:21 P.M.]

I, [GARY EAGAN], AM [22] years old. My date of birth is [5-23-59], I live at [13302 BALTIMORE AVE.]. This person to whom I give the following voluntary statement, [SGT. RASKOSKY] [BAUGHMAN], having identified and made himself known as a [DETECTIVES] of the Hammond Indiana Police Department, DULY WARNED AND ADVISED ME, AND I KNOW:

1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.

2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

3. That I can stop and request an attorney at any time during the course of the taking of any statements or during the course of any such conversation.

4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

5. That if I cannot hire an attorney, one will be provided for me.

WAIVER

I have read the foregoing statement of my rights and I am fully aware of the said rights. I do not desire the services of any attorney at this time and before proceeding with the making of any statement or during the course of any conversation with any police officers, and hereby waive said right. No promises or threats have been used against me to procure any statement or induce any conversation. That the statement I am about to give is the truth and that I give it of my own free will.

(Signed) [Gary J. Eagan]

TIME [4:23 p.m.] DATE [5-18-82]

I have read each page of this statement and waiver, consisting of [2] pages, each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at [5:25 PM] M, on the [18] day of [MAY], 19[82].

(Signed) [Gary J. Eagan]

CERTIFICATION

I hereby certify that the foregoing warning and waiver was explained and read by me to the above signatory, and that he also read it and has affixed his signature hereto in my presence, and that I will so testify in court.

[Sgt. Roger A. Raskosky]"

Eagan then gave the police an inculpatory statement. The following day, May 19, 1988, Eagan led the police to the scene of the crime and directed the police to the location of the weapon, a knife, and the victim's clothing, which was promptly recovered. At trial, both Eagan's statements and the clothing and weapon were admitted into evidence over his objection.

Reasons For Allowance Of The Writ.

I.

THE SEVENTH CIRCUIT'S DETERMINATION THAT EAGAN'S CONFESSIONS WERE NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY GIVEN IS IN CONFLICT WITH DETERMINATIONS OF THE U.S. SUPREME COURT AND A MAJORITY OF THE CIRCUIT COURTS ON THIS ISSUE

Respondent's position on this issue can be stated no better than was done by Judge Coffey in his dissent to the majority decision in this cause. (at page 27-28 appendix.)

> After researching and reviewing our colleague's decisions, it is clear that defendant's purely semantical and hyper-technical challenges to the sufficiency of a particular *Miranda* warning have been convincingly rejected by the Fifth, Second, Fourth, Eighth, Tenth and Eleventh Circuits.
>
> * * *
>
> Today, the majority rejects and disregards the great weight of authority, leaving our circuit standing alone and thus in conflict with the vast majority of other circuits, and instead resurrects *Twomey's* "overly technical application of the *Miranda* rule." *Id.* at 1253 (Pell, J.,

> dissenting). In so doing, the majority commits a regrettable mistake.

The Seventh Circuit determined the decisions of the state court and District Court, that Eagan's statements were knowingly and voluntarily given, were in error. The majority of the Seventh Circuit determined the first statement was inadmissible because the first warning was constitutionally defective. Specifically, the Seventh Circuit found the following language in the first warning constitutionally defective:

> "You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*" (page 5, Appendix)

According to the Seventh Circuit this language is ambiguous and misleading and presumptively invalid in view of the holding in *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972). The majority went on to conclude the first defective warning tainted the second, rendering the subsequent confession and evidence obtained thereby fruit of the poisonous tree and equally inadmissible.

The decision of the Seventh Circuit is in error for three reasons. First, the decision ignores the current trend of decisions of the Supreme Court in this area of law. Second, the decision is inconsistent with the reasoning employed by the Seventh Circuit in other decisions of this issue. Finally, this decision contradicts the decisions of a majority of the other Circuit Courts.

The recent decisions of this court discussing Miranda[1] display a noticeable trend away from overly simplistic reliance upon the use of "magic words" to inform a defendant of his rights. This Court has recently re-emphasized the principle

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[1] *Colorado v. Connelly*, 479 U.S. 157 107 S.Ct. 515, 93 L.Ed.2d 473 (1987); *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987); *Connecticut v. Barnett*, 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987).

that the totality of the circumstances must be reviewed in determing the validity of any particular confession. In *Connecticut v. Barret*, 479 U.S. 523, 107 S.Ct. 828, 832 (1987), the Court stated:

> "Nothing in our decisions, however, or in the rationale of Miranda, require authorities to ignore the *tenor* or *sense* of a defendant's response to these warnigs." (emphasis added).

The Seventh Circuit while discussing the "totality of the circumstances" standard has nonetheless applied a "per se violation" approach resting upon the use of specific "magic words" the Circuit Court has found objectionable.

> Although over fifteen years have passed since this court rendered *Twomey*, it remains the "seminal case in this circuit dealing with the issue of ambiguously worded *Miranda* warnings," *Em'er v. Duckworth*, 549 F.Supp. 379, 381 (N.D. Indiana, 1982). We see no reason to stray from its teachings now. The "internal inconsisten[cies]", *United States ex rel. Placek v. State of Illinois*, 546 F.2d 1298, 1300 (7th Cir. 1976), inherent in this type of warning are no less ambiguous and misleading today than they were fifteen years ago. (Opinion of the Circuit Court, appendix at 7-8).

The Seventh Circuit's objection to the language of the advice of rights in this case is also incompatible with other recent decisions of the Seventh Circuit and a majority of the other circuits which have addressed the issue. In *Richardson v. Duckworth*, 834 F.2d 1366 (7th Cir. 1987) the Circuit Court stated, rightly so, with respect to the formulation of the Miranda warning itself, the Supreme Court has . . . adopted a flexible analysis, "and has never mandated that law enforcement officers use certain 'magic words' to inform a defendant of his rights." *Id.* at 1370. In *United States v. Johnson*, 426 F.2d 1112 at 1115-1116, (7th Cir. 1970) *cert. denied* 400 U.S. 842 (1970) the Court held:

> "Harry Johnson was told that a lawyer would be appointed '*if and when you go to court*' and claims this did not fully advice him of his right to have an attorney present during the custodial interrogation. However, he signed a statement which, *read as a whole, complied with the Miranda requirements.* Having signed the written waiver form, without evidence to the contrary, he cannot now contend that he did not understand his rights. *See Bell v. United States*, 382 F.2d 985, 987 (9th Cir. 1969), *cert. denied*, 390 U.S. 965, 88 S.Ct. 1070, 19 L.Ed.2d 1165 (1968).

Nonetheless, in this case the Seventh Circuit reaffirmed its decision in *United States ex rel Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972) applying *Twomey's* unrealistic and hypertechnical application of Miranda, objecting to the same language approved in *Johnson, supra.*

Such a formalistic application of Miranda has been rejected by a majority of the Circuits addressing the issue. The Second Circuit reviewed language similar to that contained in the advice of rights rejected by the Seventh Circuit in this cause in *Massimo v. United States*, 463 F.2d 1171 at 1174 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973):

> (c) You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
>
> (d) You have the same right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of furnishing you a lawyer but one will be appointed for you, if you wish, if and when you go to court.*

The Second Circuit found this language constitutionally sufficient in view of the advice of rights as a whole. The Fourth Circuit reviewed language indistinguisable in content in *Wright v. North Carolina*, 483 F.2d 405, 410 (4th Cir. 1973), *cert. denied*, 413 U.S. 936 (1974) and also found it constitutionally adequate:

> . . . You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to advice and

> presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to Court. . . .*

In *United States v. Lacy*, 446 F.2d 511 at 512-513 (5th Cir. 1971) the Fifth Circuit also reviewed similar language and held it to be a constitutionally sufficient advice of rights:

> . . . You have the right to talk to a lawyer for advice *before* we ask you any questions, and to have him with you during the questioning. You have this right to the advice and *presence* of a lawyer, even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. . . .*

So, too, the Eighth Circuit has reviewed and upheld similar language to that objected to by the Seventh Circuit:

> . . . You can stop the questioning anytime. It means that you have the right to have an attorney present with you at this time; and it means that if you do say anything, that it can be used against you later; and *that you do have the right to have an attorney appointed by the Court for you if you are later charged with a Federal offense.*

Klinger v. United States, 409 F.2d 299, 308 (8th Cir. 1969), *cert. denied* 396 U.S. 899 (1969).

The Tenth Circuit in *Coyote v. United States*, 380 F.2d 305 (10th Cir. 1967) *cert. denied*, 389 U.S. 992 (1967), addressed this issue and concluded quite accurately:

> ". . . Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. *We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used*, considering the age, background and intelligence of the individual being interrogated, *impart a clear, understandable warning of all of his rights.*" Id. at 308.

The Eleventh Circuit has also rejected the position taken by the Seventh Circuit in *United States v. Contreras*, 667 F.2d 976, 978 (11th Cir. 1982), *cert. denied* 459 U.S. 849 (1982), reviewing the following language:

> "'You have the right to consult your attorney before making any statement or answering any question, and you can have your attorney present while we interrogate you.
>
> If you want an attorney but cannot pay for one on your own, the United States Magistrate in this city or in the Federal Court will assign you an attorney free of charge.'"

Thus, as Judge Coffey so aptly stated in his dissent to the majority's decision in this cause:

> [A]fter researching and reviewing our colleagues' decisions, it is clear that defendants' purely semantical and hyper-technical challenges to the sufficiency of a particular *Miranda* warning have been convincingly rejected by the Fifth, Second, Fourth, Eighth, Tenth and Eleventh Circuits.

The great weight of authority on this issue would therefore militate in favor of upholding the admissibility of the first statement given by Eagan. If the Seventh Circuit's anachronstic approach to the first statement were not bad enough, the error is compounded by their conclusion the second statement was tainted by the first and also inadmissible.

II.

THE SEVENTH CIRCUIT ERRED IN DETERMINING THAT EAGAN'S SECOND STATEMENT WAS TAINTED BY AN INADEQUATE ADVISEMENT OF RIGHTS PRIOR TO HIS FIRST STATEMENT

The second advice of rights read out loud to Eagan, then read and signed by him contains no constitutionally objectonable language, even by Seventh Circuit standards. However, the Seventh Circuit held:

> As a result of the first warning, Eagan arguably believed that he could not secure a lawyer during inter-

> rogation. The second warning did not explicity correct this misinformation. (page 9, Appendix)

Even assuming *arguendo* the first statement by Eagan was the product of a constitutionally infirm advice of rights, a point not conceded by Petitioner, the Seventh Circuit has ignored the proper standard to be applied to such circumstances. When the totality of the circumstances are reviewed it becomes obvious the second statement is admissible regardless of the Seventh Circuit's determination as to the admissibility of the first statement.

The applicable standard was most recently set out in *Oregon v. Elstad*, 470 U.S. 298 at 318 (1985):

> Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. *The relevant inquiry is whether, in fact, the second statement was also voluntarily made.*"

The findings of state courts as to the voluntariness of confessions are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d); *Perri v. Director, Department of Correction of Illinois*, 817 F.2d 448 (7th Cir. 1987). This is true even where no express finding is made by the state court so long as such a finding is "implicit in a state court's opinion.". *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217 (7th Cir. 1987).

The Seventh Circuit, out of hand, observes "of course, we know very little about the factual circumstances surrounding those events [leading to Eagan's second statement] because the state courts did not directly examine the issue" (Appendix page 9). This observation is quite simply incorrect. The record of the November 19, 1982, pre-trial suppression hearing, submitted as a supplement to the record at the Circuit Court's request, contains a thorough discussion of the factual circumstance surrounding the second statement. At the suppression hearing there was ample testimony by Officer Raskosky and

Baughman, Eagan's interrogators, as to Eagan's behavior and physical appearance, the advice of rights, Eagan's responses and his conduct during questioning. The passage of twenty-nine hours between statements was also established. Eagan also testified as to his perception of the events.

After hearing the above described testimony, the state trial judge denied Eagan's motion to suppress as to both statements. Implicit in this denial of the motion to suppress was the necessary finding that Eagan had voluntarily and knowingly waived his Miranda rights at both opportunities. The trial court's determination was upheld on appeal and again by the District Court in denying Eagan's petition for writ of habeas corpus. Given this set of facts the Seventh Circuit was under an obligation to refrain from substituting "its own judgment as to the credibility of witnesses' for that of the state courts", *Richardson v. Duckworth*, 834 F.2d 1366, at 1372 (7th Cir. 1987). A careful review of the record with an eye toward the "totality of the circumstances" can render only one conclusion, that Eagan voluntarily and knowingly waived his rights at the time of the second statement. Thus, the second inculpatory statement at the very least was admissible, as was the physical evidence obtained therefrom.

CONCLUSION

The Seventh Circuit erred in determining the first statement given by Eagan was the product of a constitutionally inadequate advice of rights. Their determination is in conflict with a majority of Circuit Court which have reviewed the issue as well as the current standards of the United States Supreme Court. Further, the Seventh Circuit's decision that Eagan's second inculpatory statement was tainted by the first allegedly inadequate warning of rights is in conflict with the recent decisions of the Supreme Court. Wherefore, Petitioner respectfully prays the Court grant this Petition for Writ of Certiorari to review the decision of the United States Court of Appeal for the Seventh Circuit.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

Michael A. Schoening
Deputy Attorney General

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 24, 1988.

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge
HON. JESSE E. ESCHBACH, Senior Judge*

GARY JAMES EAGAN,	)
	) Appeal from the
Petitioner-Appellant,	) United States District
	) Court for the
No. 86-2178 vs.	) Northern District of
	) Indiana, South Bend
JACK R. DUCKWORTH,	) Division
Warden,	)
	) No. S 86-56
Respondent-Appellee.	) Allen Sharp, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by counsel for the respondent-

*Judge Eschbach did not participate in the vote on the petition for rehearing *en banc*.

appellee in the above-entitled cause, a majority** of the judges on the original panel have voted to deny the petition for rehearing. A vote of the active members of the court having been requested, and a majority*** of the judges in regular active service having voted to deny the petition for rehearing *en banc*, accordingly,

IT IS ORDERED that the aforesaid petition for rehearing, with suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

**Judge Coffey voted to grant a rehearing.

***Judges Posner, Coffey, Easterbrook, and Manion voted to grant a rehearing *en banc*.

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-2178

GARY JAMES EAGAN,

Petitioner-Appellant,

v.

JACK R. DUCKWORTH, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. S 86-56—**Allen Sharp**, *Judge*.

ARGUED JUNE 2, 1987—DECIDED MARCH 22, 1988

Before BAUER, *Chief Judge*, COFFEY, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge*.

BAUER, *Chief Judge*. The petitioner, Gary Eagan, appeals from the district court's order denying his petition for a writ of habeas corpus. We reverse and remand.

I.

The petitioner was tried and convicted by a Lake County, Indiana jury of attempted murder for stabbing a woman nine times after she refused to have sexual relations with him.

According to the evidence introduced at trial, Eagan and several companions picked up the woman as they drove through Chicago late on the evening of May 16, 1982. Sometime thereafter, Eagan, his friends and the woman met with several other men, all of whom drove together to Indiana and parked on a beach along the Lake Michigan shoreline. The woman then had sexual relations with several of the men in the group, although it is not clear from the record whether she was coerced into the sexual activities or consented upon the payment of money. Eagan, his original companions, and the woman then separated from the larger group. Shortly thereafter, they returned to the same Lake Michigan beach where Eagan and his companions apparently desired to continue their sexual activities with the woman. She refused. A struggle ensued, which ended with Eagan stabbing the woman nine times and then fleeing.

Eagan and his companions returned to Chicago where Eagan called a Chicago policeman he knew to report that he had seen the naked body of a dead woman lying on the beach along the shores of Lake Michigan. Eagan subsequently led the Chicago police to the woman. The police found the woman screaming for help, and upon seeing Eagan, the woman asked him in the presence of the police why he had stabbed her. Eagan explained to the police that he had been with the woman earlier that evening but had been attacked by several men who abducted the woman. The Chicago police turned the matter over to the Hammond, Indiana police, who requested that Eagan accompany them to the Hammond police station for questioning.

At approximately 11:00 a.m. the following morning, May 17, 1982, detectives from the Hammond Police Department questioned Eagan. Before questioning, Hammond police detectives read to Eagan, and asked him to sign, a waiver form which provided:

YOUR RIGHTS

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. ***We have no way of giving you a lawyer but one will be appointed for you, if you wish, if and when you go to court.*** If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.[1]

(Emphasis added.) During the ensuing interview, Eagan gave an exculpatory recitation of his activities the night of the crime.

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[1] The rest of the waiver signed by Eagan provided:

WAIVER

> I [petitioner filled in his name] have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers of the Hammond, Indiana Police Department, in regard to an investigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so.
>
> Prior to any questioning, I was furnished the above statement of my rights at [11:14 a.m.] on [5/17/82] at [H.P.D.] by [Roger Raskosky and Thomas Baughman] of the Hammond Police Department. I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.
>
> Signed [Eagan]

At approximately 4:00 p.m. the following day, May 18th, the Hammond police interviewed Eagan for a second time. Before this interrogation, Eagan signed another waiver form which stated:

> 1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.
>
> 5. That if I do not hire an attorney, one will be provided for me.

After reading and signing this waiver form, Eagan admitted that he had stabbed the woman and then led police to the area along the Lake Michigan shoreline where he had discarded the knife used in the stabbing as well as several items of clothing. At trial, the state court admitted Eagan's confession, the knife, and the clothing. The jury found Eagan guilty of attempted murder but acquitted him of rape. The court sentenced him to 35 years imprisonment.

II.

Eagan argues that the police obtained his confession in violation of his constitutional right against self-incrimination because the first waiver form he signed failed to apprise him adequately of his right to a lawyer, if he so desired, before the police questioned him. Specifically, Eagan claims that the "if and when you go to court" passage in the sixth sentence of the waiver form was confusing and misleading and that he did not understand that the court would appoint him counsel before police interrogation.

In *United States ex rel. William v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), this court confronted a warning identical to the one issued to Eagan. In *Twomey*, the warning given by an Indiana State Trooper stated that the habeas corpus petitioner, Williams, had the "right to the advice and presence of an attorney whether you can afford to hire one or not. We have no way of furnishing you with an attorney, but one will be appointed for you, if you wish, if and when you go to court." *Id.* at 1249-1250 n.1. We stated that

> the warning given here was not an "effective and express explanation;" to the contrary, it was equivocal and ambiguous. In one breath appellant [Williams] was informed that he had the right to appointed counsel during questioning. In the next breath, he was told that counsel could not be provided until later. In other words, the statement that no lawyer can be provided at the moment and can only be obtained if and when the accused reaches court substantially restricts the absolute right to counsel previously stated; it conveys the contradictory message that an indigent is first entitled to counsel upon an appearance in court at some unknown, future time. The entire warning is therefore, at best, misleading and confusing and, at worst, constitutes a subtle temptation to the unsophisticated, indigent accused to forego the right to counsel at this critical moment.

Id. at 1250.

Although over fifteen years have passed since this court rendered *Twomey*, it remains the "seminal case in this circuit dealing with the issue of ambiguously worded *Miranda* warnings," *Emler v. Duckworth*, 549 F.Supp. 379, 381 (N.D. Indiana, 1982). We see no reason to stray

from its teachings now. The "internal inconsisten[cies]", *United States ex rel. Placek v. State of Illinois*, 546 F.2d 1298, 1300 (7th Cir. 1976), inherent in this type of warning are no less ambiguous and misleading today than they were fifteen years ago. The "if and when" language limits and conditions an indigent's right to counsel on a future event. The warning suggests erroneously that only those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait. This language further implies that if the accused does not "go to court," i.e. the government does not file charges, the accused is not entitled to an attorney at all.

Thus, this warning is constitutionally defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation. *Twomey*, 467 F.2d at 1250. We caution that our holding does not require that the police furnish an accused with counsel immediately. *See, e.g., Placek*, 546 F.2d at 1300. Nor do we urge police officers to make this appointment. The problem with the warning given Eagan is not its lack of immediacy but its confusing linkage of an indigent's right to counsel before interrogation with a future event. This potential misunderstanding violates *Miranda*. *California v. Prysock*, 453 U.S. 355, 360 (1981).[2]

III.

Under *Oregon v. Elstad*, 470 U.S. 298 (1985), Eagan's second statement was not necessarily tainted by the initial infirm warning. This conclusion, however, does not obviate our responsibility to determine whether Eagan's waiver of rights before the second statement was knowing and intelligent—the defendant's main argument on ap-

[2] Interestingly, in *Richardson v. Duckworth*, 834 F.2d 1366, 1371 (7th Cir. 1987), Judge Coffey cited *Twomey* with approval (although he distinguished it from *Richardson*) for the precise principle the majority now affirms and he attacks.

peal. Although Eagan's second statement was made voluntarily, this conclusion does not end our inquiry. In addition to being voluntary, a "waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Eagan argues that his second waiver was not knowingly and intelligently given because of the misapprehension caused by the initial warning, and the failure of the second warning to correct that misapprehension. This argument is not defeated by a determination that the second statement probably was not tainted by the improper warnings given prior to the first statement. When a defendant gives a statement while in custody, the government has the burden of showing that the defendant knowingly and intelligently waived his rights. *United States ex rel. Williams v. Twomey*, 467 F.2d 1248, 1251 (7th Cir. 1972). Whether a waiver was knowing and intelligent is a question of fact, *Perri v. Director, Department of Corrections*, 817 F.2d 448, 451 (7th Cir. 1987), requiring an evaluation of all the surrounding circumstances. *Elstad*, 410 U.S. at 318.

As a result of the first warning, Eagan arguably believed that he could not secure a lawyer during interrogation. The second warning did not explicitly correct this misinformation. Of course, we know very little about the factual circumstances surrounding these events because the state courts did not directly examine this issue. These are not matters for appellate determination and have not been adequately determined below. Accordingly, we remand for a determination of whether the defendant knowingly and intelligently waived his right to the presence of an attorney during the second interrogation.

REVERSED AND REMANDED.

COFFEY, *Circuit Judge*, dissenting. This court recently observed that "the Supreme Court has never mandated that law enforcement officers use certain 'magic words' to inform a defendant of his rights." *Richardson v. Duckworth*, 834 F.2d 1366, 1370 (7th Cir. 1987). Nonetheless, the majority reaffirms *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), resurrecting "an overly technical application of the *Miranda* rule." *Id.* at 1253 (Pell, J., dissenting). The majority's application of *Twomey* is inconsistent with the reasoning and holding of *Richardson*, as well as our earlier decision in *United States v. Johnson*, 426 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 842 (1970), and is contrary to the great weight of authority. Thus, I respectively dissent. Further, assuming *arguendo*, that *Twomey* retains its validity, rendering the petitioner's initial statement inadmissible since it was made in technical violation of *Miranda*, I would still affirm the district court. The petitioner received a subsequent constitutionally sufficient *Miranda* warning and voluntarily and knowingly waived his rights before confessing to stabbing the victim.

I.

The petitioner was tried and convicted before a jury in Lake County, Indiana, of attempted murder.[1] According to the evidence, Eagan and at least two companions picked up the woman as they drove through South Chicago, Illinois, late on the evening of May 16, 1982. The victim testified that sometime thereafter she, Eagan, and his companions, met some other men and decided to drive to Indiana and

[1] The record filed with the court on appeal did not contain the transcript of the November 19, 1982, pre-trial suppression hearing. Fortunately, with the aid and urging of this court's clerk, we have recently been provided with the suppression hearing transcript. The supplemented record before us provides us with the facts most necessary for us to decide the petitioner's federal claims, thus I would reject Eagan's assertion that he is entitled to an evidentiary hearing in the district court.

visited on a beach on the Lake Michigan shoreline. Sometime thereafter, the victim had sexual relations with at least three of the men in the group, although it is not clear from the record whether she was coerced or consented to engaging in the sexual activities. Eventually, it appears that the defendant, his companions, and the woman left the lakefront but returned later to the same beach area. The woman refused to engage in further sexual relations at which time, according to the victim's testimony, the defendant repeatedly stabbed her (9 times) and left the scene with his companions.

The petitioner returned to Chicago where he called the Chicago police and requested to talk to Officer LoBianco, with whom he was acquainted. LoBianco testified at trial that he and another officer went to an apartment building in Chicago and met Eagan. Eagan, denying his guilt, informed LoBianco that "he would like to take [him] to an area where he spotted a body." According to LoBianco's testimony, Eagan further elaborated, stating that "he found a naked woman dead" at the lakefront. LoBianco's earlier deposition testimony regarding his conversation with Eagan on the way to the lakefront was read into the trial record at this time as follows:

> "I kept asking him, 'Are you sure what you're telling me is true? Do you know what you are saying to me?', all this stuff. I kept asking him and asking him. This was a story about a homicide. What is a homicide? It's hard to say. So she was just laying there not breathing, nothing. No movement on her or nothing. And, during the whole—going to the area this is when this conversation was going on. Okay, at that time he was just somebody that found a woman, okay, dead in the weeds."

The petitioner led the Chicago police to the exact location in a wooded area along Lake Michigan in Indiana, a short distance from the Illinois-Indiana border where the police found the victim moaning and screaming for help. LoBianco further testified that upon seeing the peti-

tioner, the victim spoke up, and addressing her statements to Eagan, stated: "Why did you stab me? Why did you stab me?"

At this time LoBianco's partner called an ambulance and the victim was conveyed to a hospital. Eagan accompanied the officers to the hospital where he was initially questioned concerning his alleged discovery of a nude woman's body. The petitioner explained to LoBianco that he had come across the nude body while "he was out there for a party." At approximately 7:30 a.m. two Chicago police detectives took over the investigation and escorted Eagan back to the lakefront. At that time, the Chicago police, noting that the crime had been committed in Indiana, turned the matter over to the Indiana authorities for further investigation. Hammond Police Detectives Raskosky and Baughman arrived on the scene at approximately 8 a.m. the morning of May 17.

Officer Raskosky, while testifying at trial in answer to an interrogatory, stated that initially he believed that Eagan was only a possible witness to the stabbing. Raskosky further testified that the petitioner informed him that:

> "he [Eagan] had been attacked earlier in the evening by several subjects. He was beaten, and he requested that he wanted to make out a police report, obtain a warrant for those subjects. So he voluntarily went to the Robertsdale Station [a Hammond police station] to make out a report with Officer Lora."

Officer Lora transported the defendant to the Hammond police station.

While at the police station, Eagan filed a battery complaint stating he had been with the victim at the lakefront and that she departed from the area with three men in a van. He further reported that these same three individuals in the van threw bottles at his car and attacked him, striking him in the face. Subsequently, Detectives Raskosky and Baughman arrived at the Hammond (Robertsdale) station and asked Eagan "if he would willingly come to the main station" to make a statement. Eagan agreed, and the detectives transported the petitioner to the Hammond police headquarters.

At 11:14 a.m. the morning of May 17, before Detectives Raskosky and Baughman questioned the petitioner about the stabbing of the woman, Detective Raskosky informed the petitioner of his constitutional rights, reading the following warning from a Hammond Police Department form entitled "Voluntary Appearance; Advice of Rights"[2]:

[2] Officer Raskosky testified at the November 19, 1982, pre-trial suppression hearing that the warning from the "Voluntary Appearance" form was given only to those individuals who "voluntarily appeared to give a statement." The completed "Voluntary Appearance" form provided:

"VOLUNTARY APPEARANCE; ADVICE OF RIGHTS

YOUR RIGHTS

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

W A I V E R

I, [*Gary Eagan*] have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers of the Hammond, Indiana Police Department, In [sic] regard to an investigation they are conducting I know that I am not under arrest and that I can leave this office if I wish to do so.

Prior to any questioning, I was furnished the above statement of my rights at [*11:14* a.m.] on [*5-17-82*] at [*H.P.D.*] by
(time) (date) (place)

(Footnote continued on following page)

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer."

(Emphasis added). In his initial statement Eagan provided the detectives with an exculpatory recitation of his activities the night of the crime consistent with those recounted in his battery complaint. The petitioner admitted that he had been with the woman earlier in the evening and had engaged in sexual activity with her, but stated that she left him to join "three other guys" in a van. Again, Eagan asserted that these same men attacked him later that same morning.

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[2] *continued*

[*ROGER RASKOSKY & THOMAS BAUGHMAN*] of the Hammond Police Department. I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Signed [*Gary J. Eagan*]

[11:16 a.m. 5/17/82 H.P.D.]
(time) (date) (place)

Witness [*Sgt. Roger A. Raskosky*]

Witness _____

Okey [sic] to take your photo: [*Gary Eagan*]

Date _____ Time _____"

Eagan subsequently was placed in custody in the "record lock-up" located in the basement of the Hammond police headquarters. Some 29 hours later on the following day, May 18th, Detectives Raskosky and Baughman interviewed the petitioner for a second time. Detective Baughman testified at trial that the petitioner was again fully advised of his rights at 4:21 p.m. by Detective Raskosky who read him a waiver of rights form,[3] which provided:

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[3] Officer Raskosky testified at the pre-trial suppression hearing that after an individual is arrested or placed in custody, he/she is orally advised of his/her rights using the "Waiver and Statement" form instead of the "Voluntary Appearance" form. Compare the following "Waiver and Statement" form with the "Voluntary Appearance" form in footnote 2:

"*WAIVER AND STATEMENT*

HAMMOND POLICE DEPARTMENT

CASE # [*82-14893*]

DATE [*5-18-82*] PLACE [*H.P.D.*] TIME STARTED [*4:21 P.M.*]

I, [*GARY EAGAN*], AM [*22*] years old. My date of birth is [*5-23-59*], I live at [*13302 BALTIMORE AVE.*]. The person to whom I give the following voluntary statement, [*SGT. RASKOSKY*] [BAUGHMAN], having identified and made himself known as a [*DETECTIVES*] of the Hammond Indiana Police Department, DULY WARNED AND ADVISED ME, AND I KNOW:

1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.

2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.

(Footnote continued on following page)

"1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.

2. That I have the right to consult with an attorney of my own choice before saying anything, and

[3] *continued*

4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

5. That if I cannot hire an attorney, one will be provided for me.

WAIVER

I have read the foregoing statement of my rights and I am fully aware of the said rights. I do not desire the services of any attorney at this time and before proceeding with the making of any statement or during the course of any conversation with any police officers, and hereby waive said right. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me to procure any statement or induce any conversation. That the statement I am about to give is the truth and that I give it of my own free will.

(Signed) [*Gary J. Eagan*]

TIME [*4:23 p.m.*] DATE [*5-18-82*]

I have read each page of this statement and waiver, consisting of [*2*] pages, each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at [*5:25 PM*] M, on the [*18*] day of [*MAY*], 19[*82*].

(Signed) [*Gary J. Eagan*]

CERTIFICATION

I hereby certify that the foregoing warning and waiver was explained and read by me to the above signatory, and that he also read it and has affixed his signature hereto in my presence, and that I will so testify in court.

[*Sgt. Roger A. Raskosky*]"

that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.

4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

5. That if I cannot hire an attorney, one will be provided for me."

Eagan then read the waiver form aloud to the officers and Raskosky asked him whether he understood his rights. Eagan replied he did. Detective Baughman testified that Eagan appeared to understand his rights. Both detectives observed him sign the waiver of rights form at 4:23 p.m. An hour later, at 5:25 p.m., Eagan completed his second statement, giving a full confession concerning the stabbing of the woman. The following morning, May 19, Eagan led Officers Raskosky, Baughman and Myszak to the area along the Lake Michigan shoreline where the police recovered the knife used in the stabbing of the victim as well as several items of her clothing which Eagan had previously discarded. At the state trial, the court received Eagan's two statements and also the knife and clothing the police had recovered, over the petitioner's objection. The jury found the petitioner guilty of attempted murder but acquitted him of rape; he was sentenced to a term of 35 years' imprisonment.

II.

In spite of the fact that Eagan initially (voluntarily) contacted the police and reported seeing a nude, dead body and in light of the record revealing that Eagan on at least two occasions waived his *Miranda* rights and confessed, the majority holds that the petitioner's initial *Miranda* warning was constitutionally defective and tainted his sec-

ond waiver of rights "because of the misapprehension caused by the initial warning."[4] I disagree and would hold that the initial warning given Eagan was constitutionally sufficient. Further, I would overrule *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), and *United States v. Cassell*, 452 F.2d 533 (7th Cir. 1971),[5] to the extent these cases hold otherwise and join Judge Pell in his rejection of "an overly technical application of the *Miranda* rule." *Twomey*, 467 F.2d at 1253 (Pell, J., dissenting).

In *Twomey*, the defendant, Williams, was given the following *Miranda* warning:

> "Before we ask you any questions, it is our duty as police officers to advise you of your rights and to warn you of the consequences of waiving your rights.
>
> You have the absolute right to remain silent.
>
> Anything you say to us can be used against you in court.

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[4] Detective Raskosky testified at the pre-trial hearing that the petitioner was not under arrest at the time he gave the initial exculpatory statement. Under these circumstances, Eagan would not have been entitled to *Miranda* warnings nor would the law enforcement officers have been obligated to apprise him of his rights. *See, e.g., California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517 (1983); *U.S. v. Bush*, 820 F.2d 858 (7th Cir. 1987). Because I would hold that Eagan was initially properly apprised of his rights, and in the alternative that the admissibility of the petitioner's initial statement is irrelevant to our holding in light of *Elstad*, the issue of whether the petitioner was actually in custody at the time he provided the Hammond police with an exculpatory tale of the events which occurred during the late evening and early morning hours of May 16 and 17, 1982, need not concern us.

[5] In *Cassell*, an earlier panel of this court held that the following warning was constitutionally deficient: "If you cannot afford a lawyer and want one, a lawyer will be appointed for you if and when you go to court or before a United States Commissioner."

> You have the right to talk to an attorney before answering any questions and to have an attorney present with you during questioning.
>
> You have this same right to the advice and presence of an attorney whether you can afford to hire one or not. *We have no way of furnishing you with an attorney, but one will be appointed for you, if you wish, if and when you go to court.*
>
> If you decide to answer questions now without an attorney present, you will still have the right to stop answering at any time. You also have the right to stop answering any time until you talk to an attorney."

Twomey held, as does the majority today, that this warning is equivocal and ambiguous and constitutes a *per se* violation of *Miranda*. This formalistic, technical and unrealistic application of *Miranda* has been soundly rejected by the vast majority of other circuits deciding the issue, i.e., the Fifth, Second, Fourth, Eighth, Tenth and Eleventh Circuits.

In *United States v. Lacy*, 446 F.2d 511 (5th Cir. 1971), the Fifth Circuit held that a *Miranda* warning, similar to the warning given Eagan, was constitutionally sufficient. The *Miranda* warning provided:

> "Before we ask you any questions, you must understand your rights; you have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice *before* we ask you any questions, and to have him with you during the questioning. You have this right to the advice and *presence* of a lawyer, even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. *You also have the right to stop answering at any time until you talk to a lawyer.*"

Id. at 512-13 (emphasis in original as well as added). The *Lacy* court held that "this warning comports with the requirements of *Miranda*," and observed:

> "That the attorney was not to be appointed until later *seems immaterial since Lacy was informed that he had the right to put off answering any question until the time when he did have an appointed attorney.*"

Id. at 513 (emphasis added).[6]

The Second Circuit, in *Massimo v. United States*, 463 F.2d 1171, 1174 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973), adopted the logical and realistic approach taken by the Fifth Circuit in *Lacy* and specifically rejected this court's contrary conclusion in *Cassell*. In *Massimo*, the defendant, again like Eagan, was advised:

[6] But *see Fendley v. United States*, 384 F.2d 923 (5th Cir. 1970) (holding that "the defendant was not advised, as *Miranda* requires, of his right to have *court-appointed* counsel present *during the interrogation*," when an FBI agent advised the defendant that "if he did not have any money to obtain an attorney that the Judge, the Court, would appoint one for him when he went to court."); *Lathers v. United States*, 396 F.2d 524 (5th Cir. 1968) (The officer's warning to the defendant provided that "if he was unable to hire an attorney the Commissioner or the Court would appoint one for him." The court held that this warning violated the "edicts of *Miranda*."). Initially, one observes that *Lacy* failed to mention *Fendley* and as one court stated, *Lacy* "appears to have overruled [*Fendley*] *sub silento*." *United States v. Olivares-Vega*, 495 F.2d 827, 829 n.8 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974). Further, *Lacy* cited to *Lathers*, noting that its "twin requirements were met: the defendant was informed that (a) he had the right to the presence of an attorney and (b) that the right was to have an attorney 'before he uttered a syllable.' " Thus, it appears that *Lacy* rejected the premise, implicit in *Fendley* and *Lathers*, that a *Miranda* warning was *per se* insufficient if the warning contained language conditioning an indigent's right to appointed counsel on some future event. The continuing validity of *Lathers* has also been questioned by the Eleventh Circuit in *United States v. Contreras*, 667 F.2d 976, 978-79 (11th Cir.), *cert. denied*, 459 U.S. 849 (1982). It appears the *Contreras* court found that *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806 (1981), effectively overruled *Lathers*.

> "(a) You have the right to remain silent.
>
> (b) Anything you say can be used against you in court.
>
> (c) You have the right to talk to a lawyer for advice before we ask you any question and to have him with you during questioning.
>
> (d) You have the same right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of furnishing you a lawyer but one will be appointed for you, if you wish, if and when you go to court.*
>
> (e) If you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Id. at 1173. The court held that this warning was "adequate" under *Miranda*, stating:

> ". . . Massimo was clearly warned that he could have a lawyer present *during* questioning. *The only conclusion Massimo would have been justified in reaching on the basis of the warning was that, since he was clearly entitled to have a lawyer present during questioning and since no lawyer could now be provided, he could not now be questioned.*"

Id. at 1174 (emphasis added).[7]

Similarly, in *Wright v. North Carolina*, 483 F.2d 405 (4th Cir. 1973), *cert. denied*, 415 U.S. 936 (1974), the Fourth Circuit found the reasoning in *Lacy* and *Massimo* persuasive and sustained the sufficiency of the warning

[7] *See also United States v. Lamia*, 429 F.2d 373 (2d Cir.), *cert. denied*, 400 U.S. 907 (1970); *United States v. Carneglia*, 468 F.2d 1084 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *United States v. Olivares-Vega*, 495 F.2d 827 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Floyd*, 496 F.2d 982 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States v. Burns*, 684 F.2d 1066 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983).

given the defendant. In *Wright*, the defendant was apprised of his rights as follows:

> " 'Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to Court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.' "

Id. at 410 (emphasis added). In upholding the validity of the *Miranda* warning as given, the Fourth Circuit observed that:

> " 'Stripped of its cry of pain, defendant's contention is simply that he was entitled to be warned not only of *his right to counsel, but of his right to instant counsel. Miranda, however, does not require that attorneys be producible on call, or that a Miranda warning include a time table for an attorney's arrival.* Nor does it seem to us requisite that the officer conducting the *interview declare his personal and immediate power to summon an attorney.* The adequacy of the warning *is not jeopardized by the absence of such embellishments.*' "

Id. at 407 (quoting *Mayzak v. United States*, 402 F.2d 152, 155 (5th Cir. 1968)) (emphasis added).

The Eighth Circuit too has had the opportunity to evaluate the sufficiency of *Miranda* warnings similar to those given Eagan. In *Klingler v. United States*, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969), law enforcement officers read the defendant a "Standard Treasury Department *Miranda* warning" providing:

> " 'Before we ask you any questions, it is my duty to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in court, or other proceedings. You have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning. *You may have an attorney appointed by the United States Commissioner or the court to represent you if you cannot afford or otherwise obtain one.* If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting a lawyer. However, you may waive the right to advice of counsel and your right to remain silent, and you may answer questions or make a statement without consulting a lawyer if you so desire.' "

Id. at 307-08 (emphasis added). Subsequently, the officer "reiterated in his own words for the [defendant's] benefit the contents of the form:

> '[I]t means you don't have to talk to me if you don't want to, and if you do decide to talk to me, that you can stop the questioning anytime. It means that you have the right to have an attorney present with you at this time; and it means that if you do say anything, that it can be used against you later; and *that you do have the right to have an attorney appointed by the Court for you if you are later charged with a Federal offense.*' "

Id. at 308 (emphasis in original). Subsequently, the defendant contended that these *Miranda* warnings were insufficient and that his inculpatory statements made pursuant to these warnings were erroneously received in evidence. The Eighth Circuit rejected the defendant's assertions, holding:

> " 'The fact that the [officer] . . . truthfully informed [the defendant] . . . that the [officer] . . . could not

> furnish a lawyer until federal charges were proffered against him does not vitiate the sufficiency of an otherwise adequate warning. * * * *Miranda* * * * does not require that attorneys be producible on call, or that a Miranda warning include a time table for an attorney's arrival. * * * To so hold would be to allow a defendant to use his right to an attorney as a weapon against his custodians. He would simply argue if you will not furnish me an attorney now, even though I am told that I can remain silent, I will talk and after talking object to my words going into evidence. This argument is both hollow and specious.' "

Id. (quoting *Mayzak v. United States*, 402 F.2d 152, 155 (5th Cir. 1968)). Further, in *Tasby v. United States*, 451 F.2d 394, 398 (8th Cir. 1971), *cert. denied*, 405 U.S. 992 (1972), the defendant challenged as inadequate a *Miranda* warning advising him "that an attorney would be appointed 'at the proper time.' " The Eighth Circuit held: "This statement, even though a slight deviation from the *Miranda* prescription, *does not negate the over-all effectiveness of the warning.*" *Id.* at 398-99 (emphasis added).

The Tenth Circuit has also specifically rejected hypertechnical applications of *Miranda*. In *Coyote v. United States*, 380 F.2d 305, 307 (10th Cir.), *cert. denied*, 389 U.S. 992 (1967), the court summarized the defendant's assertions, noting:

> "The specific complaint here is that the mandate of *Miranda v. State of Arizona*, . . . was not observed because the clause in the written statement that '* * * I can talk to a lawyer or anyone before saying anything, and that the judge will get me a lawyer if I am broke' reflects that appellant was not informed with sufficient clarity of his right to a court appointed attorney at the time the statement was made. Thus he seems to say in effect that at most the Agent advised him only that he could talk to a lawyer before making the statement if he could afford to hire one, and that the judge would appoint a lawyer when he came to trial if he could not afford one."

The court held that the defendant "had been adequately advised of his constitutional right to the assistance of counsel," *Id.* at 309, after rejecting the defendant's purely technical and nitpicking arguments.[8] The court set forth a reasonable and appropriate standard for determining the sufficiency of a particular *Miranda* warning (the standard recently fully embraced by this court in *Richardson v. Duckworth*, 834 F.2d at 1370):

> ". . . Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. *We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used*, considering the age, background and intelligence of the individual being interrogated, *impart a clear, understandable warning of all of his rights.*"

380 F.2d at 308 (emphasis added). The Tenth Circuit further noted that "it is for the court to objectively determine whether in the circumstance of the case the words used were sufficient to convey the required warning." *Id.* Essentially the Tenth Circuit rejected a *per se* analysis

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[8] The court observed:

> "Counsel for the appellant argued in the trial court, as here, that the *wording and punctuation* of the written statement itself supports his client's understanding of the advice given to him by the Agent. Specifically he says that the comma preceding the phrase 'and the judge will get me a lawyer if I am broke' renders the sentence susceptible of the interpretation that court appointed counsel would be available only after appellant had been before the judge."

Coyote, 380 F.2d at 308 (emphasis added).

(articulated today by the majority) for evaluating the adequacy of a specific *Miranda* warning and instead objectively evaluated both the words used to convey the warning as well as the circumstances in which it was given.

More recently, the Eleventh Circuit, in *United States v. Contreras*, 667 F.2d 976 (11th Cir.), *cert. denied*, 459 U.S. 849 (1982), rejected a defendant's assertions that the *Miranda* warnings given him "failed to apprise him of his rights to have counsel appointed immediately, prior to any questioning." The defendant, Contreras, was warned by a customs officer as follows:

> " 'You have the right to consult your attorney before making any statement or answering any question, and you can have your attorney present while we interrogate you.
>
> *If you want an attorney but cannot pay for one on your own, the United States Magistrate in this city or in the Federal Court will assign you an attorney free of charge.*' "

Id. at 978 (emphasis added). Subsequently, a Drug Enforcement Administration special agent informed the defendant that:

> " 'You have the right to consult an attorney before making any statement or answering any question posed to you, and he can be present at the interrogation.
>
> *You have the right to be represented by an attorney who will be appointed by the United States federal magistrate or court in the event of insolvency on your part.*' "

Id. (emphasis added). Relying on *California v. Prysock*, 453 U.S. 35, 101 S.Ct. 2806 (1981), the court upheld the sufficiency of the warnings given Contreras, stating:

> "A *Miranda* warning need not explicitly convey to the accused his right to appointed counsel 'here and now,' and to the extent that *Lathers* and other precedents of this court require such explicit warnings, they are overruled. *Prysock*, moreover, clearly controls the case before us. *Both the customs and DEA warnings informed appellant of his right to consult with an attorney prior to questioning, to have an attorney present during questioning, and to have counsel appointed. The warnings did not condition appointment of an attorney on any future event and therefore were not deficient.*"

Id. at 979 (emphasis added).

After researching and reviewing our colleagues' decisions, it is clear that defendants' purely semantical and hyper-technical challenges to the sufficiency of a particular *Miranda* warning have been convincingly rejected by the Fifth, Second, Fourth, Eighth, Tenth and Eleventh Circuits. In particular, the *Lacy*, *Massimo*, and *Wright* courts all unequivocally held that *Miranda* warnings, identical in all relevant aspects to those given Eagan, were constitutionally sufficient. On the other hand, it appears that this circuit stands alone with its *Twomey* and *Cassell* decisions, which hold that a *Miranda* warning containing the "condemned clause" ("if and when you go to court"), is irrebuttably presumed insufficient.[9] *Twomey*, 467 F.2d at

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[9] In *Gilpin v. United States*, 415 F.2d 638 (5th Cir. 1969), a decision predating *Lacy* and relying on *Lathers*, the defendant was warned that: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, *if you go to court*." Although the court held that the warning ultimately violated *Miranda*, the court did not, as does the majority today, "condemn" the clause outright. Instead, the court evaluated the totality of the circumstances, noting:

> "Gilpin had only a sixth-grade education. He signed the waiver and made his statement the morning after he was arrested for drunkenness. Apparently his mental faculties were not functioning fully the 'morning-after,' since he confused the date of the mail robbery with the date he was in jail. Keeping in mind the Supreme Court's admonition as to the heavy burden imposed on the prosecution to show an intelligent

(Footnote continued on following page)

1252. In other words, *Twomey* and *Cassell* stand for the anachronistic and formalistic proposition that giving a *Miranda* warning which contains the "condemned clause" constitutes a *per se* violation of *Miranda*. Today, the majority rejects and disregards the great weight of authority, leaving our circuit standing alone and thus in conflict with the vast majority of other circuits, and instead resurrects *Twomey*'s "overly technical application of the *Miranda* rule." *Id.* at 1253 (Pell, J., dissenting). In so doing, the majority commits a regrettable mistake.

More importantly, the majority's decision conflicts with this circuit's decision in *United States v. Johnson*, 426 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 842 (1970).[10] In *Johnson* Judge Kiley, writing for a panel of this court, which included Senior Judge Castle and Judge Kerner, clearly rejected the defendant's nitpicking challenge to his *Miranda* warning. The court stated:

> "Harry Johnson was told that a lawyer would be appointed *'if and when you go to court'* and claims this did not fully advise him of his right to have an attorney present during the custodial interrogation. However, he signed a statement which, *read as a whole, complied with the* ***Miranda*** *requirements.* Having signed the written waiver form, without evidence to the contrary, he cannot now contend that he did not understand his rights. *See Bell v. United States*, 382 F.2d 985, 987 (9th Cir. 1969), *cert. denied*, 390 U.S. 965, 88 S.Ct. 1070, 19 L.Ed.2d 1165 (1968)."

Id. at 1115-16 (emphasis added). The court obviously evaluated the *Miranda* warning utilizing the totality of the circumstances test, and we, too, should evaluate the sufficiency of the warnings given Eagan under this test. *See Richardson v. Duckworth*, 834 F.2d at 1370. Moreover, the court specifically rejected Johnson's allegation, which is identical to Eagan's, that the *Miranda* warning given him was inadequate because he "was told that a lawyer would be appointed 'if and when you go to court.' " The *Johnson* court clearly and properly rejected the defendant's assertions. Why the majority holds to the contrary is unexplained since the majority's decision leaves our circuit with conflicting cases sending mixed signals to the trial courts of this circuit.

Further, observe that in *United States ex rel. Placek v. State of Illinois*, 546 F.2d 1298 (7th Cir. 1976), the defendant argued that his *Miranda* warnings were deficient because they failed to apprise him of his right to immediate appointment of counsel. There we held that the following *Miranda* warning was not constitutionally infirm:

> "Placek was advised that he had the right to remain silent; that anything he said could be used against him; that 'if he wanted an attorney present, he could have one': and that 'if he could not afford one, an attorney would be *appointed through the Court for him.*' "

Id. at 1300 (emphasis added). This court held that the warnings "effectively warned that [Placek] need not make any statement until he had the advice of an attorney." *Id.* Eagan was similarly warned.

In *Placek*, the defendant, as does this majority, relied on *Twomey*, but in *Placek* we distinguished *Twomey*

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[9] *continued*

> waiver of counsel, *we are compelled to say that Detective Gothard's initial warning failed to convey to Gilpin that he was entitled to the appointment of an attorney 'here and now'.* We hold therefore that the first warning failed to meet *Miranda* standards."

Id. at 641 (emphasis added). Thus, even assuming that *Gilpin* retains its validity in light of *Lacy* and the Eleventh Circuit's reasoning in *Contreras*, *Gilpin* does not support the majority's assertion that "the 'if and when' language is constitutionally defective."

[10] Significantly, the *Twomey* majority, citing to *Johnson*, conceded that "a [*Miranda*] warning including the phrase that a lawyer would be appointed for the defendant 'if and when you go to court,' ha[d] been given approval by this Court." *Twomey*, 467 F.2d at 1252-53. Further, the *Twomey* "majority opinion [did] not purport to overrule *United States v. Johnson*." *Id.* at 1253 (Pell, J., dissenting).

stating that the warnings given in *Twomey* were internally inconsistent "in that they advised the accused of the right to have an attorney present during questioning, but also indicated that an attorney could not be appointed until a later time." *Id.*[11] But isn't this the fact situation in the vast majority of *Miranda* cases since law enforcement officers neither have the power and authority, nor should they, to select and appoint counsel. The power to appoint counsel must continue to rest with the impartial judicial officer. Further, *Miranda* does not now and never did stand for the proposition that the " 'officer conducting the interview declare his personal and immediate power to summon an attorney.' " *Wright v. North Carolina*, 483 F.2d at 407 (quoting *Mayzak*, 402 F.2d at 155). I am of the opinion that we would be far better off if we ceased to lend credence to these meaningless and technical distinctions and instead consider each *Miranda* warning "read as a whole," *Johnson*, 426 F.2d at 1115, and determine whether under the circumstances the defendant understood his right to remain silent, both before and during questioning, until he consulted with a retained or appointed attorney. In other words, "a slight deviation from the *Miranda* prescription, does not negate the over-all effectiveness of the warning." *Tasby v. United States*, 451 F.2d at 398-99.

Further, the *Miranda* warnings initially given Eagan are sufficient under *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806 (1981), although the majority would like its readers to believe the contrary. In *Prysock* the following events transpired:

> "On January 30, 1978, Mrs. Donna Iris Erickson was brutally murdered. Later that evening respon-

[11] Today, the majority, echoing the technical distinction made in *Placek*, holds "The 'if and when' language is constitutionally defective because it may lead an indigent accused to believe that he is entitled to counsel *only* if and when he 'goes to court,' and not prior to police interrogation."

dent and a codefendant were apprehended for commission of the offense. Respondent was brought to a substation of the Tulane County Sheriff's Department and advised of his *Miranda* rights. He declined to talk and, since he was a minor, his parents were notified. Respondent's parents arrived and after meeting with them respondent decided to answer police questions. An officer questioned respondent, on tape, with respondent's parents present. The tape reflects that the following warnings were given prior to any questioning:

'Sgt. Byrd: . . . Mr. Randall James Prysock, earlier today I advised you of your legal rights and at that time you advised me you did not wish to talk to me, is that correct?

Randall P.: Yeh.

Sgt. Byrd: And, uh, during, at the first interview your folks were not present, they are now present. I want to go through your legal rights again with you and after each legal right I would like for you to answer whether you understand it or not . . . . Your legal rights, Mr. Prysock, is [sic] follows: Number One, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this?

Randall P.: Yeh.

Sgt. Byrd: If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: You all, uh,—if,—you have the right to have a lawyer appointed to represent you at not cost to yourself. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?

Randall P.: Yes.'

At this point, at the request of Mrs. Prysock, a conversation took place with the tape recorder turned off. According to Sgt. Byrd, Mrs. Prysock asked if respondent could still have an attorney at a later time if he gave a statement now without one. Sgt. Byrd assured Mrs. Prysock that respondent would have an attorney when he went to court and that 'he could have one at this time if he wished one.' "

Id. at 356-57, 101 S.Ct. at 2807-08. The defendant, like Eagan, contended that his *Miranda* warnings were inadequate since they failed to specifically inform him of his right to have counsel appointed prior to questioning. The Supreme Court rejected the defendant's challenges, stating "[t]his Court has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant." *Id.* at 359, 101 S.Ct. at 2809. The Court held:

> "It is clear that the police *in this case fully conveyed* to respondent his rights as required by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one. *These warnings conveyed to respondent his right to have a lawyer appointed if he could not afford one prior to and during interrogation.*"

Id. at 361, 101 S.Ct. at 2810 (emphasis added). It is apparent that the Court evaluated the sufficiency of the warning under the totality of circumstances test, thus implicitly rejecting the majority's *per se* approach.

The Supreme Court did point out, however, that a *Miranda* warning which in fact conditioned the right to appointed counsel on some future event could be held constitutionally infirm. The Court cited *United States v. Garcia*, 431 F.2d 134 (9th Cir. 1970) (per curiam), as an example. There the Ninth Circuit observed:

> "After Garcia was arrested, federal agents repeatedly questioned her. During the course of the interrogation sessions, *the agents gave her several different versions of the* ***Miranda*** *bundle of warnings. On no occasion was a warning given fully complying with* ***Miranda***. Taken together, the warnings were inconsistent. At one point she was told that she had a right to the presence of counsel 'when she answered any questions'; on another, she was told that she could 'have an attorney appointed to represent you when you first appear before the U.S. Commissioner or the Court.' "

Id. (emphasis added). In *Garcia*, because the defendant never received a complete warning at any one time the defendant's right to appointed counsel "was linked with some future point in time after the police interrogation." *Prysock*, 455 U.S. at 360, 101 S.Ct. at 2810. Similarly, in *People v. Bolinski*, 260 Cal. App. 2d 705, 723, 67 Cal. Rptr. 347, 358 (1968), the defendant, who was then in Illinois but who was to be transferred to California, was apprised that "the court would appoint [a lawyer] in Riverside County [California]." Clearly, the defendant's right to appointed counsel was conditioned on a future event.

Unlike the defendant in *Garcia*, Eagan was completely apprised of his rights when Officer Raskosky read him the warnings from the "Voluntary Appearance: Advice of Rights" form. Additionally, the petitioner was not given "*several* different versions of the *Miranda* bundle of warnings." Further, at no time was Eagan's right to appointed counsel conditioned on a future event as was the defendant in *Bolinski* who apparently believed that he would travel some 2,000 miles before counsel would be appointed. Thus, contrary to the majority's holding, Eagan's *Miranda* warnings are sufficient under *Prysock*.

Lastly, the majority's holding is incompatible with our recent decision in *Richardson v. Duckworth*. There we observed that "with respect to the formulation of the *Miranda* warning itself, the Supreme Court has . . . adopted a flexible analysis," and "has never mandated that law enforcement officers use certain 'magic words' to inform a defendant of his rights." 834 F.2d at 1370. Thus, consistent with *Prysock*, we adopted the totality of circumstances test as set forth in *Coyote v. United States*, *supra*, as "the appropriate standard to determine the sufficiency of a particular *Miranda* warning." *Richardson*, 834 F.2d at 1370.

Applying this standard to Eagan's initial *Miranda* warnings, the record conclusively establishes that Eagan was well aware of his right to have a lawyer present prior to and during interrogation. Eagan was advised that:

(1) You have the right to remain silent.

(2) Anything you say can be used against you in court.

(3) You have the *right to talk to a lawyer for advice before* we ask you any questions, and

(4) to have him with you *during questioning*.

(5) You have *this right to the advice and presence of a lawyer even if you cannot afford to hire one*.

(6) We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.

(7) *If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time.*

As an appellate reviewing court, after evaluating the totality of the information given the defendant, I would hold that Eagan was clearly informed that he had the right to talk to an attorney before the police questioned him, even if he couldn't personally afford to retain one and was specifically advised of his right to appointed counsel. *Miranda* neither requires that he be told that he has the right to appointed counsel "here and now" nor " 'require[s] that attorneys be producible on call or that a *Miranda* warning include a time table for an attorney's arrival.' " *Wright*, 483 F.2d at 407 (quoting *Mayzak*, 402 F.2d at 155). Thus, in light of the great weight of authority, and in particular the *Lacy*, *Massimo*, and *Wright* decisions, this court's earlier *Johnson* decision, the Supreme Court's *Prysock* decision, and our recent holding in *Richardson*, I would hold that Eagan's initial warning "given as a whole," survives constitutional scrutiny and is sufficient under *Miranda*. *Twomey*, 467 F.2d at 1254 (Pell, J., dissenting). I am convinced that we should reject the majority's technical application of *Miranda*, and I would overrule *Twomey* and *Cassell*.

III.

Alternatively, assuming *Twomey* and *Cassell* retain their validity and thus the petitioner's initial exculpatory statement should have been suppressed since it was made in technical violation of *Miranda*, I would affirm the district court nonetheless because the Supreme Court's recent decision in *Oregon v. Elstad*, 420 U.S. 298, 105 S.Ct. 1285 (1985), rather than the Fifth Circuit's dated holding in *Gilpin*, as urged by the petitioner, controls the admissibility of Eagan's second and incriminating confession.

There, the defendant, Gilpin, was initially arrested and charged with drunkenness, and in his *inebriated state* he blurted out that he had stolen a U.S. mail bag. The next morning the defendant "then repeated the substance of his earlier confession" pursuant to an alleged inadequate *Miranda* warning.[12] Later, the defendant was given another set of *Miranda* warnings. A few days later Gilpin was again apprised of his rights by an officer utilizing the same alleged faulty warning given originally, and again the defendant confessed.

The *Gilpin* court relied on an earlier Supreme Court decision resting on Fourth Amendment grounds which held:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first."

United States v. Bayer, 331 U.S. 532, 541-42, 68 S.Ct. 1394, 1398 (1947). Thus, relying on *Bayer*, the court in *Gilpin* observed that the defendant's initial statement made pursuant to the asserted inadequate warning led to the defendant's subsequent confession and held:

> "Here . . . Gilpin knew that 'the cat was out of the bag.' One confession led to another. The effect of the tainted confession was not dissipated by the time of the next confession. A belated adequate warning could not put the cat back in the bag."

Gilpin v. United States, 415 F.2d at 642. Here, the petitioner argues that his second incriminating statement was

[12] The defendant was warned: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if you go to court."

similarly tainted by the initial allegedly insufficient warning and thus asserts that both statements should have been suppressed. (The majority, however, asserts that "Eagan argues that his second waiver was not knowingly and intelligently given because of the misapprehension caused by the initial warning, and the failure of the second warning to correct that misapprehension.")

Even in *Bayer*, however, the Supreme Court observed that all later confessions were not necessarily tainted, stating:

> "This Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those [coercive] conditions have been removed."

United States v. Bayer, 331 U.S. at 542, 68 S.Ct. at 1398. More recently, in *Elstad*, the Supreme Court specifically rejected the reasoning of a few courts, like the *Gilpin* court, which imputed "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver, noting:

> "A handful of courts has, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made."

Oregon v. Elstad, 420 U.S. at 318, 105 S.Ct. at 1298. The Supreme Court further stated: "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver."

Id. at 312, 105 S.Ct. at 1295. In conclusion, the Supreme Court held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite[13] *Miranda* warnings." *Id.*

Thus I would determine initially whether Eagan's first statement, allegedly the result of a technical violation of *Miranda*, was nonetheless made voluntarily. Secondly, I analyze whether the second set of *Miranda* warnings was constitutionally sufficient, and lastly, my inquiry focuses on the voluntariness of the second and incriminating confession.

A. Voluntariness of Initial Statement

In *Miller v. Fenton*, 474 U.S. 104, 110, 106 S.Ct. 445, 456 (1985), the Supreme Court reaffirmed that the "ultimate issue of 'voluntariness' is a legal question" and as we recently noted "subject to plenary federal review." *Perri v. Director, Dep't of Corrections of Illinois*, 817 F.2d 448, 450 (7th Cir. 1987). Applying this standard, my review of the record convinces me that Eagan's initial statement was voluntary. The record discloses that the petitioner *initiated* the contact with the law enforcement officers on his own, calling an acquaintance of his (LoBianco) on the Chicago police department from his apartment. Subsequently, he met with LoBianco and his partner and reported that he had found the body of a nude woman and then directed and accompanied them to the scene. After leaving the scene of the crime, Eagan offered to accompany the police to the Hammond (Robertsdale) station to file a battery complaint in which he stated that he had been with the victim earlier that morning but had been attacked by the same men with whom the victim departed. Eagan went with Detectives Raskosky and Baughman to

[13] The warnings referred to in this case as the "requisite" warnings are the second set of *Miranda* warnings given to the petitioner-appellant, Eagan.

the Hammond police headquarters where he was advised of his rights. Here Eagan signed a waiver form which stated that he was "not under arrest" and was free to "leave [the] office if [he] wish[ed] to do so." Rather than leaving the station, Eagan remained and provided the officers with a statement. The record is completely barren of evidence suggesting, much less establishing, that the law enforcement officers either coerced, threatened or physically abused him. Further, the petitioner in effect concedes the issue in not claiming that his first statement was made involuntarily. I am convinced and would hold that the petitioner's initial statement, even assuming it was made in technical violation of *Miranda*, was nonetheless given freely and voluntarily.

B. Adequacy of the Second *Miranda* Warning

I am equally convinced that the second set of warnings recited to the petitioner were constitutionally sufficient. In *Richardson*, as I pointed out in Part II, this court observed that the Supreme Court "never mandated that law enforcement officers use certain 'magic words' to inform a defendant of his rights," and adopted the following standard articulated by the Tenth Circuit which foreshadowed the Supreme Court's decision in *Prysock*:

> " 'Surely *Miranda* is not a ritual of words to be recited by rote according to didactic niceties. What *Miranda* does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all his rights.' "

Richardson v. Duckworth, 834 F.2d at 1370 (quoting *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir.), *cert. de-*

nied, 389 U.S. 992 (1967)). Thus, I determine under the totality of circumstances test whether the second warning administered to Eagan constituted a "fully effective equivalent" of the four essential warnings articulated in *Miranda*.

Eagan was advised of his rights for the second time as follows:

> "1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say, may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation, I can refuse to answer any further questions, and remain silent, thereby terminating the conversation.
>
> 5. That if I cannot hire an attorney, one will be provided for me.

I do not agree with the petitioner's *initial* assertion that this warning is deficient because "[a]t no time was [he] informed of his right to have an attorney appointed prior to or during the interrogation," App. Br. at 11, since the warning, considered in its totality, makes clear that he is entitled to appointed counsel before and during questioning if he so desired. Further, the record establishes that the petitioner, a 22-year-old adult, affixed his signature in longhand to the waiver form, after reading the waiver form aloud, demonstrating the requisite intellectual ability to understand the basic and essential warnings given him. Thus, I would reject Eagan's attempt to trivialize and find fault with the recited second *Miranda* warning.

Secondly, the petitioner asserts, and the majority echoes, that the second *Miranda* warning "when viewed together with the first warnings" did not adequately inform him of his "right to have assigned counsel present at the second interrogation." App. Br. at 11. The petitioner notes that the second *Miranda* warnings "speak only of 'counsel of my own choice' and never states how or when counsel would be provided if the accused is indigent." *Id.* at 12. Eagan asserts that the respondent "failed to show that the second statement was sufficiently attenuated from the first statement." *Id.* I deem Eagan's assertions as meritless because (1) he makes only bald allegations and fails to articulate or delineate in any manner how or why the initial warning tainted the second warning; and (2) as I observed, the complete second warning clearly explains that Eagan would have been provided with appointed counsel before and during the second interrogation had he so requested. Further, as pointed out by the Supreme Court, no "purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver" where the initial statement was voluntary. *Oregon v. Elstad*, 470 U.S. at 318, 105 S.Ct. at 1298.[14] Thus, I would hold that the second set of *Miranda* warnings given Eagan were constitutionally antiseptic, and thus sufficient.

---

[14] The petitioner argues that the Court's decision in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975), requires that the state has the "burden of showing attenuation." App. Br. at 12; thus, Eagan asserts that "absent a more developed record, the second statement should have been suppressed as tainted by the initial statement." *Id.* at 12-13. In *Brown* the defendant made two in-custody post-*Miranda* statements subsequent to his *unlawful* arrest. The Court held that the giving of *Miranda* warnings alone "cannot make the act [the confession] sufficiently a product of free will to break, for *Fourth Amendment purposes*, the causal connection between the illegality and the confession." 422 U.S. at 603, 95 S.Ct. at 2261 (emphasis added). Petitioner has not argued that the Fourth Amendment has been violated in this case; thus, *Elstad*, rather than *Brown*, governs under the present circumstances.

Lastly, assuming *arguendo* that *Gilpin* applied to the facts before us, my decision would be unaffected. Gilpin, unlike Eagan, actually confessed to the crime before he was given proper *Miranda* warnings. *Gilpin v. United States*, 415 F.2d at 639. Thus, the court reasoned that the defendant, regardless of whether he subsequently received an adequate *Miranda* warning, probably believed it was useless to remain silent, i.e., the defendant "could not put the cat back in the bag." *Id.* at 642. Eagan, however, never confessed to stabbing the victim until after he was given the second sufficient *Miranda* warning, thus distinguishing the present case. Officer Baughman testified, without objection, that Eagan, in his battery complaint, admitted he had been with the victim at the lakefront. The petitioner further reported that the victim willingly departed with three other men in a van and stated that these same men attacked him later. Eagan's initial challenged statement, combined with his battery complaint, both exculpatory in nature, selectively described in graphic detail the victim's alleged consensual sexual activities with him and two companions at the lakefront. It cannot even be inferred that Eagan "let the cat out of the bag" until after Detective Raskosky administered the second *Miranda* warning, at which time the petitioner confessed to the stabbing. Thus, no taint, as in *Gilpin*, can be attributed to the confession as long as it was given voluntarily. The test is simply, as the Supreme Court noted, "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Oregon v. Elstad*, 420 U.S. at 312, 105 S.Ct. at 1295. Eagan was properly warned.

C. Voluntariness of the Confession

Although the "ultimate issue of 'voluntariness' is a legal question," *Miller v. Fenton*, 474 U.S. at 110, 106 S.Ct. at 456, subject to "plenary federal review," *Perri*, 817 F.2d at 450, the findings of state courts on the subsidiary questions of whether the defendant knowingly and voluntarily

waived his *Miranda* rights are entitled to the § 2254(d)[15] presumption of correctness if the state court findings are fairly supported by the record. *See, e.g., Perri v. Director, Dep't of Corrections of Illinois*, 817 F.2d 448 (7th Cir. 1987) (holding that state court findings that a waiver of *Miranda* rights is knowing and intelligent are factual findings entitled on the § 2254(d) presumption of correctness); *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217 (7th Cir. 1987) (holding that the § 2254(d) presumption of correctness also applies to state court factual findings that a waiver of *Miranda* rights is voluntary.) "This is especially true, as in this case where the voluntariness issue focuses on the credibility of witnesses." *Richardson v. Duckworth*, 834 F.2d at 1372. Further, if fairly supported by the record, the state court's failure to "*expressly state*" that the defendant voluntarily and knowingly waived his *Miranda* rights does not render the § 2254(d) presumption inapplicable as long as the findings of a knowing and voluntary waiver are "implicit in a state court's opinion." *Bryan*, 820 F.2d at 221; *Perri*, 817 F.2d at 452.

Unfortunately, the majority completely disregards the holdings of our prior decisions in *Bryan* and *Perri* regarding the presumption of correctness to be applied to state court factual findings. Instead, the majority states "of course, we know very little about the factual circumstances surrounding these events because the state courts did not *directly* examine the issue." The majority is simply wrong.

---

[15] Section 2254 provides in part:

> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . . ."

28 U.S.C. § 2254(d).

During the November 19, 1982, pre-trial suppression hearing, Officers Raskosky and Baughman both testified that Officer Raskosky read Eagan his *Miranda* warnings from the waiver of rights form. Raskosky next testified that at this time Eagan read the waiver form back to the officers. Raskosky "asked [Eagan] if there was any part of it that he didn't understand or [was] questionable to him," and Eagan "stated that he understood everything on the form." Tr. of November 19, 1982, Suppression Hearing, p.13. Officer Baughman also testified that Eagan understood his rights. The record further reveals that Eagan read the waiver form aloud and then signed the form.

The petitioner also took the stand at the pre-trial suppression hearing. Eagan, incredibly, testified that he didn't remember speaking with his acquaintance, Chicago Police Officer LoBianco, during the early morning hours of May 17, in spite of the fact that he [Eagan] initiated and called the police department specifically looking for LoBianco. After LoBianco responded to the call, Eagan told him an exculpatory tale of discovering a nude body at the lakefront and led him to the exact location where the victim identified him and stated: "Why did you stab me?" Continuing his charade of selective memory, the petitioner testified that he neither recollected being at the initial Hammond (Robertsdale) police station nor remembered parts of his two statements. He blamed his memory lapse on being high, drunk and suffering from withdrawals after ingesting drugs, "some Tulenols [sic],"[16] and "Canadian

[16] "Tuinal is a combination of equal parts of Seconal® Sodium (secobarbital sodium, Lilly) and Amytal® Sodium (amobarbital sodium, Lilly), barbituric acid derivatives that occur as white, odorless, bitter powders. . . . Tuinal, a moderately long-acting barbiturate, is a central-nervous-system depressant. In ordinary doses, the drug acts as a hypnotic. Its onset of action occurs in 15 to 30 minutes, and the duration of action ranges from three to 11 hours. It is detoxified in the liver."
Physicians Desk Reference, p. 1168 (41st ed. 1987).

Club" during the late evening hours of May 16, 1982. The petitioner's testimony at the suppression hearing was impeached on cross-examination after Eagan conceded that he had not ingested any drugs after contacting the police. The petitioner's testimony to the effect that he was "high and intoxicated" was also impeached by the fact that both challenged statements were clear, concise and fairly detailed. Further, Officer Raskosky, who had previously observed inebriated individuals, as well as those suffering from withdrawals, was recalled to the stand and testified that Eagan neither appeared to be intoxicated nor did he appear to be under the influence of drugs nor going through withdrawals. Eagan's testimony was more than suspect in the eyes of both the trial judge and this dissenter considering that Eagan was conscious enough to phone the police, meet them, and then lead them to the exact spot of the victim's moaning and screaming body, and in itself discredited the petitioner's testimony that he was so "high and intoxicated" that he couldn't remember.

After hearing all the pertinent testimony and observing each witness, the state trial judge who was in the best position to evaluate the witness's (Eagan's) credibility did not believe him and denied his motion to suppress. It is obvious that the state court regarded Eagan's testimony as incredible, *thus implicitly finding that the petitioner knowingly and voluntarily waived his second set of* ***Miranda*** *rights.*[17] As we recently stated, no appellate court, including this court, can or should " 'substitute its

[17] Assuming the state trial court erred when it also implicitly found that Eagan knowingly and voluntarily waived his initial *Miranda* rights because he was not intoxicated at the time, Eagan would be in no better position to argue that the first *Miranda* warning somehow tainted the second warnings because according to Eagan he couldn't "remember" much of what transpired during the evening hours of May 16, 1982, or the morning of the 17th. What one does not remember cannot give rise to "misapprehensions" or reasonably "taint" a second *Miranda* warning.

own judgment as to the credibility of witnesses' for that of the state courts." *Richardson v. Duckworth*, 834 F.2d at 1372. The majority disregards this mandate and would now remand for further factual findings. I disagree and would hold that the state court's findings are more than fairly supported by the record and therefore accord the state court's findings of fact the presumption of correctness required under § 2254(d) and further *hold that Eagan knowingly and voluntarily waived his* ***Miranda*** *rights*. Additionally, the record is barren of evidence from which one could infer, much less establish, that Eagan was coerced or induced to confess; nor has he even challenged the "voluntariness" of his confession. Thus, I would hold, after a detailed review of the record, given the totality of the circumstances, that Eagan's confession was voluntarily made and properly received in evidence at trial along with the knife and clothing the police recovered as a result of the petitioner's statement.

Lastly, assuming that Eagan's initial statement might conceivably have been made in technical violation of *Miranda* and should have been suppressed, its admission was *harmless error because (1) it essentially repeated the facts contained in his battery complaint, including that he had been with the victim that evening but that she had departed with three men in a van, which were received in evidence without objection; (2) he admitted only to having sexual relations with her and that she asked for money; he said absolutely nothing to implicate himself; and (3) after having been given the proper second* ***Miranda*** *warning, he confessed to the brutal stabbing.*

IV.

The petitioner also asserts that the trial court's instruction that voluntary intoxication was not a defense to attempted murder amounted to a denial of his due process right. The trial court instructed the jury that voluntary intoxication was not a defense to attempted murder because an Indiana statute operative at the time of Eagan's commission of the crime precluded voluntary intoxication

as a defense to attempted murder. The Indiana Supreme Court held this statute unconstitutional, *Terry v. State*, 465 N.E. 1085 (Ind. 1984), and subsequently held that the *Terry* decision was to be applied retroactively. *Pavey v. State*, 498 N.E.2d 1195 (Ind. 1986). Thus, under Indiana law, it was error for the trial court not to instruct Eagan's jury on the defense of voluntary intoxication. However, the Supreme Court of Indiana found "no reversible error" as a result of the trial court's instruction that voluntary intoxication was not a defense to attempted murder, and the petitioner has failed to present this court with any evidence or case law that persuades me that the Indiana Supreme Court incorrectly determined the error of the state trial court was harmless. As the United States Supreme Court has explained:

> "Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."

Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396, 400 (1977); *see also United States ex rel. Bonner v. DeRobertis*, 798 F.2d 1062, 1067 (7th Cir. 1986). In rejecting Eagan's claim, the Indiana Supreme Court stated:

> "Neverthele , we find no reversible error in the court's having given the instruction. Although there was some evidence presented that the Defendant may have been intoxicated at the time he committed the crime, it was never interposed as a defense; and the record reveals that his intoxication, if existing, was not of the debilitating degree that could have raised a reasonable doubt upon the existence of the requisite *mens rea*.
>
> Defendant did not testify. The only evidence of his intoxication came from Officer LoBianco and from Defendant's sister, Katherine Roberts. . . .

> Defendant gave two statements to the police. . . . In neither statement, however, did Defendant make any claim that he was intoxicated or under any disability at any time during the criminal episode.
>
> Immediately following the criminal events, Defendant drove an automobile through the city streets some considerable distance, to the home of his sister, reported the episode to her and asked for assistance for his friend who had been cut. He had the presence of mind to heed her advice and to contact Officer LoBianco, to guide him back to the scene of the crime and to fabricate a story concerning his involvement. The only relevant evidence belied a mental state so impaired by alcohol or drugs as to preclude the existence of the *mens rea*. The issue was simply not present, hence the giving of the instruction, although error, was harmless."

Eagan v. State, 480 N.E.2d 946, 951-52 (Ind. 1985). The petitioner has not persuaded me that the Indiana Supreme Court committed error in concluding that the voluntary intoxication instruction the trial court gave constituted harmless error. Accordingly, I agree with the district court and hold that the petitioner's claim of a constitutional violation based on the voluntary intoxication instruction the state trial court gave was without merit.

V.

For the aforementioned reasons, I respectfully disagree and dissent from the majority's decision and would affirm the order of the district court denying Eagan's petition for a writ of habeas corpus.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GARY JAMES EAGAN

Petitioner

v. No. S 86-56

JACK R. DUCKWORTH,
Superintendent

MEMORANDUM AND ORDER

The petition in this case was filed on February 3, 1986 seeking relief under 28 U.S.C. § 2254. The petitioner Gary James Eagan is now an inmate at the Indiana State Prison at Michigan City, Indiana and was convicted on December 7, 1982 of attempted murder in the Superior Court of Lake County at Crown Point, Indiana. The state court file has been filed and examined pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293 (1963).

The mandates of *Lewis v. Faulkner*, 689 F. 2d 100 (7th Cir. 1982) have been met.

A direct appeal was taken to the Supreme Court of Indiana which affirmed the conviction in an opinion by Justice Prentice reported at 480 N.E. 2d 946 (1985). This court has carefully read the majority opinion of Justice Prentice and the dissenting opinion of Justice DeBruler, the latter being reported at 480 N.E. 2d page 952. The findings in the majority opinion are subject to the presumptions of correctness found in *Sumner v. Mata*, 449 U.S. 539 (1981).

The issues raised in the petition are two, but the same appear to be interrelated. The first one is a general assertion which encompasses a more specific one. The first assertion is that the fact finding procedure employed by the Supreme

Court of Indiana was not adequate to afford a full and fair hearing and that such a full and fair hearing was not received. The second issue raised has to do with the admission of the confession of Gary James Eagan in the Indiana trial court. It does appear that these issues have been fully exhausted as required by *Rose v. Lundy*, 455 U.S. 509 (1982) and *Duckworth v. Serrano*, 454 U.S. 1 (1981). The issue that must therefore be the center of our focus is the one related to the voluntariness of a confession. He also raises some issue with regard to the appointment of a Judge Pro Tem which need not detain us long.

Since the issue here is one of involving a voluntary confession, invoking the Fifth Amendment Under *Miranda v. Arizona*, 384 U.S. 436 (1966), this court is not entitled to deal with the issue under *Stone v. Powell*, 428 U.S. 465 (1976). The latter case has not been applied to Fifth Amendment issues to the satisfaction of this court. So the record here will be carefully and fully examined to the issue of admitting this confession, *see White v. Finkbeiner*, 687 F. 2d 885, 889 (7th Cir. 1982), *remanded*, 104 S. Ct. 1433 (1984) for reconsideration under *Solem v. Stumes*, 104 S. Ct. 1338 (1984). Footnote 15 in *White v. Finkbeiner*, 687 F. 2d 885 refers to the opinion of Justice Powell in *Brewer v. Williams*, 430 U.S. 387, 414 (1977), which leaves open the possible application of *Stone v. Powell* to Fifth and Sixth Amendment issues. For present purposes that issue remains to be solved by the Supreme Court or this Circuit.

Also the factual record must be here examined as far as sufficiency is concerned under the standards of *Jackson v. Virginia*, 443 U.S. 307 (1979). Under the same the record is sufficient.

The fundamental issue in this record is the voluntariness of confession and candor requires this court to admit that it is a close one as is well illustrated by the dissenting opinion of Justice DeBruler. From the record it appears that the petitioner was questioned on two occasions following the incident for which he was arrested. The first statement was made on the morning of the alleged crime prior to his arrest. Prior to being questioned petitioner was advised of his rights to read and sign

a waiver of rights form which explained those rights. The petitioner allegedly read and signed the form prior to making his statement. Petitioner was again questioned by the police on the next day. The statement made on this second occasion is the confession complained of which was admitted in the course of the trial.

The record in this case is very sparse in regard to that pretrial hearing and the results thereof. It is correct that under the law of Indiana the requirements for findings as a result of such a hearing are not so rigid as they are under the Federal Rules of Criminal Procedure for criminal trials in a United States District Court. It has never been the intent or desire of this court to impose the full-blown federal system on state court judges except to the extent that the Constitution of the United States mandates it. An examination of the state transcript discloses that the pretrial motion to suppress was filed on October 21, 1982 and was set for hearing on November 19, 1982 at 8:30 o'clock A.M. The court proceedings on November 19, 1982 indicate that the State of Indiana by its deputy prosecuting attorney, the defendant, Gary James Eagan, in person and by his counsel, were in open court and the matter was submitted on Eagan's motion to suppress written statements. The record then recites: "Evidence is heard and arguments had and the court being duly advised, now denies motions to suppress."

That record may be adequate, if only barely so under the prevailing law in the State of Indiana. If that is the only record present there would be a serious deficiency but it is not all that is present. There is an extensive trial record that relates directly to the question of voluntariness which issue was carefully and in this court's view correctly considered and decided by Justice Prentice in his issue I at 480 N.E. 2d at page 948. The petitioner has cited *Emler v. Duckworth*, 549 F. Supp. 379 (N.D. Ind. 1982) from this court and the reasoning and result there are consistent with the reasoning and result here.

The record here does not reflect an arguable violation of *Edwards v. Arizona*, 451 U.S. 477 (1981) even though this trial was after the effective date of that opinion and is not affected by

the decision in *Solem v. Stumes*, ___ *U.S.* ___, *104 S. Ct. 1338 (1984). See also, White v. Finkbeiner,* 753 F. 2d 540 (7th Cir. 1985). For the application of *Edwards* to direct appeals, see *Shea v. Louisiana*, ___ U.S. ___, 105 S. Ct. 1065 (1985).

The testimony of Detective Sergeant Thomas Baughman beginning at 225 (Tr.) bears directly on the issue of voluntary confession and clearly manifests adherence to *Miranda v. Arizona*, 384 U.S. 436 (1966), especially as to the so-called second statement.

The issue raised with regard to instructions present no error of constitutional dimension that must be considered here. This court is well familiar with *United States v. Hillsman*, 522 F. 2d 454 (7th Cir. 1975) and there was no violation of those concepts here.

On the subject of instructions, Court's Instruction 13 at Tr. p. 68 dealt specifically with the subject of voluntariness.

The petitioner also makes some attempt to question the procedures with regard to the appointment of Judge Pro Tem to take the verdict because of the necessary absence of the state trial judge to attend a funeral of a family member. The court has carefully examined the transcript of how the state trial judge handled that procedure and he handled it very appropriately and delicately. This court is well aware of the sensitivity with which trial judges must approach the processes of jury deliberation. For example, see *U.S. v. Chaney*, 559 F. 2d 1094 (7th Cir. 1977).

In this case there is nothing in the record to indicate any of the kinds of alleged coercive conduct that were suggested in the *Chaney* case. As a simple matter of state law the factual context of *Bailey v. State*, 397 N.E. 2d 1024 (Ind. App. 1979) is not applicable to the situation in this case where the judge was appointed merely to receive a verdict.

For all the foregoing reasons, the petition for writ under 28 U.S.C. § 2254 is now DENIED. IT IS SO ORDERED. Enter June 24, 1986.

ALLEN SHARP
Chief Judge
United States District Court

AO 72
(Rev. 8/82)

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT: NORTHERN DISTRICT OF INDIANA
CASE TITLE: GARY JAMES EAGAN V JACK DUCKWORTH, Supt	DOCKET NUMBER: SOUTH BEND, INDIANA S 86 - 56 NAME OF JUDGE OR MAGISTRATE: ROBERT L. MILLER, JR

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that for reasons set forth in Memorandum and Order entered herein

Petition for Writ of Habeas Corpus is DENIED.

CLERK: Richard B. Timmons	DATE: 6/27/86
(BY) DEPUTY CLERK: Eleanor J. Engstrom	

ORIGINAL

Number 88-317

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JACK R. DUCKWORTH, Warden,

Petitioner,

vs.

GARY JAMES EAGAN,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The above named Respondent, Gary James Eagan, by his attorney, Howard B. Eisenberg, respectfully alleges and shows the Court as follows:

1. Respondent was granted leave to proceed in forma pauperis in this case by both the United States District Court for the Northern District of Indiana and the United States Court of Appeals for the Seventh Circuit.

2. The undersigned attorney was appointed by the United States Court of Appeals for the Seventh Circuit to represent Respondent pursuant to the provisions of the Criminal Justice Act of 1964, as amended.

3. Respondent remains confined at the Indiana State Penitentiary at Michigan City, Indiana serving the sentence

attacked in this case.

4. Counsel believes that Respondent remains indigent, unable to pay the costs of this matter.

For these reasons, pursuant to Supreme Court Rule 46, Respondent respectfully moves this Court for leave to proceed *in forma pauperis* without the paying of costs and without the necessity of printing the enclosed Brief in Opposition.

Dated this 16th day of September, 1988.

Respectfully submitted,

HOWARD B. EISENBERG

104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901

(618) 536-4423

ATTORNEY FOR RESPONDENT

Number 88-317

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JACK R. DUCKWORTH, Warden,

Petitioner,

vs.

GARY JAMES EAGAN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

HOWARD B. EISENBERG

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ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Did the police properly comply with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966) when they informed Respondent, prior to a custodial interrogation, that although he had the right to counsel, "[w]e have no way of giving you a lawyer but one will be appointed for you, if you wish, if and when you go to court."

2. Should this Court exercise its discretion to review the admissibility of Respondent's second statement when there is no record in either state or federal court of the circumstances of that statement and when the only relief granted by the Court of Appeals was to remand the case to the District Court for fact finding?

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH PREVIOUS DECISIONS OF THIS COURT, LONG ESTABLISHED LAW IN THE CIRCUIT, AND THE MAJORITY OF DECISIONS OF OTHER COURTS.

A. The Decision in this Case was Consistent with Well Established Law in the Circuit.

The interrogation in this case took place in 1982, a full decade after the United States Court of Appeals for the Seventh Circuit ruled that these precise admonitions violated the mandate of Miranda v. Arizona, 384 U.S. 436 (1966), United States ex rel. William v. Twomey, 467 F.2d 1248 (7th Cir. 1972). Several years later William was reaffirmed by the Court of

Appeals in United States ex rel. Placak v. State of Illinois, 546 F.2d 1298, 1300 (7th Cir. 1976). The decision in this case simply reaffirmed well established law in the Circuit.

B. The Decision in this Case is Consistent with the Majority of Cases Raising this Precise Issue.

Without question, there is a split of authority on the question of the validity of Miranda warnings which inform the suspect that although he has the right to counsel, the police "have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." Contrary to the impression created by the State's Petition, however, the majority of courts which have considered the validity of these precise Miranda warnings have found them to be fatally defective because they condition the suspect's right to counsel on his appearance in court. This is certainly true of state appellate courts, Brown v. State, 396 S.2d 137 (Ala.App. 1981); State v. Cassell, 602 P.2d 410 (Alaska, 1979); Moore v. State, 251 Ark. 436, 472 S.W.2d 940 (1971); People v. Clark, 2 Cal.App.3d 510, 82 Cal.Rptr. 393 (1969); Brooks v. State, 229 A.2d 833 (Del. 1979); Cribbs v. State, 378 S.2d 316 (Fla.App. 1980); State v. Grierson, 95 Ida. 155, 504 P.2d 1204 (1972) (dictum); State v. Carpenter, 211 Kan. 234, 505 P.2d 753 (1973); State v. Dass, 184 Mont. 116, 602 P.2d 142 (1979); State v. Robbins, 4 N.C.App. 463, 167 S.E.2d 16 (1969); Commonwealth v. Johnson, 484 Pa. 349, 399 A.2d 111 (1979); State v. Creach, 77 Wash.2d 194, 461 P.2d

329 (1969).

The circuits are split on the propriety of these admonitions. The Second and Fourth Circuits have refused to overturn convictions based on substantially similar Miranda warnings, Massimo v. United States, 463 F.2d 1171 (2nd Cir. 1972), cert. denied, 409 U.S. 1117 (1973); Wright v. North Carolina, 483 F.2d 405 (4th Cir. 1973), cert. denied, 415 U.S. 936 (1974). The Fifth and Ninth Circuits have split on the issue, both upholding and rejecting the specific language involved in this case. compare, Gilpin v. United States, 415 F.2d 638 (5th Cir. 1969) with United States v. Lacy, 446 F.2d 511 (5th Cir. 1971), and United States v. Garcia, 431 F.2d 134 (9th Cir. 1970) with United States v. Noa, 443 F.2d 144, 146 (9th Cir. 1971).

The Tenth Circuit, in reversing a conviction, noted:

> ..we think the sentence: "we have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court" immediately following a statement of a present right to retained and appointed counsel is likely to confuse an unsophisticated mind.

Sullins v. United States, 389 F.2d 985, 988 fn. 2 (10th Cir. 1968). The prior decision relied upon by Petitioner (Petition p. 12), Coyote v. United States, 380 F.2d 305, 307 (10th Cir. 1967), cert. denied, 389 U.S. 992 (1967) was not dealing with the same type of admonitions involved in this appeal.

The First, Third, Sixth, Eighth*, and District of Columbia Circuits have not dealt with the precise issue raised in this

case.

Of particular interest is one of the most recent cases dealing with this issue, United States v. Contreras, 667 F.2d 976 (11th Cir. 1982), cert. denied, 459 U.S. 849 (1982). Petitioner contends (Petition, p. 13) that Contreras is contrary to the decision of the Court of Appeals in this case (Petition, p. 13). A complete reading of the decision, however, reveals that it supports the action of the Court of Appeals here. In Contreras the accused was informed only that counsel could be appointed by the court. The Eleventh Circuit considered the impact of this Court's decision in California v. Prysock, 453 U.S. 355 (1981) on Miranda warnings which informed the defendant that counsel would have to be appointed by the court. On page 13 of the Certiorari Petition the State quotes some of the Eleventh Circuit's reasoning. Immediately following the quoted the language, however, the court said:

> Prysock thus stands for the proposition that a Miranda warning is adequate if it fully informs the accused of his right to consult with counsel prior to questioning and does not condition the right to appointed counsel on some future event. (emphasis added)

667 F.2d at 979. Following this observation is a footnote which gives as examples of improper warnings a statement that counsel

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*The Eighth Circuit case relied upon by Petitioner, Klinger v. United States, 409 F.2d 299 (8th Cir. 1969), cert. denied, 396 U.S. 859 (1969) did not involve a Miranda warning which conditioned the right to counsel on some future event, i.e., counsel would only be provided "if and when" the suspect went to court.

would be available "if" the suspect went to court, citing, United States v. Garcia, supra., Gilpin v. United States, supra., and People v. Bolinski, 260 Cal.App.2d 705, 718, 67 Cal.Rptr. 347 (1968). It is thus apparent that the Eleventh Circuit would find the instant warnings to be conditional and, thus, invalid.

Respondent readily acknowledges that there is a split of authority on the precise issue presented here. However, the majority of the decided cases are in accord with the Seventh Circuit's decision here. In addition, this is an issue which was hotly litigated in the decade following Miranda. It is not a question which is being currently litigated. Indeed, as demonstrated above, it is only because the authorities failed to follow well established law in the Circuit that this case arose. This issue has been resolved in the Seventh Circuit, it is not being currently litigated elsewhere, and there is no occasion for this Court to consider the question now.

C. The Warnings Given in this Case Violated the Letter and Spirit of Miranda.

Petitioner engages in some prosecutorial wishful thinking in asserting at page 9 of the Petition that recent decisions of this Court cast doubt on the decision of the Court of Appeals in this case. While it may be helpful to Petitioner to suggest that this case involves "magic words" (Petition, p. 9) or a "hypertechnical application of Miranda" (Petition, p. 11), such

is clearly not the case. The admonitions afforded Respondent here violated the letter and spirit of the Miranda decision.

The warnings given plainly say that Eagan could not have an attorney to assist him unless he went to court. Thus, if he did not go to court, he would not get an attorney. If the interrogation was prior to his appearance in court there was "no way" he could obtain one, if indigent. Manifestly these warnings misstated a central requirement of Miranda--that counsel be provided prior to the interrogation. Here the warnings were invalid because they condition the right to counsel on appearing in court.

The issue here is not one of semantics--it is a question of Respondent's substantive rights under the Fifth and Fourteenth Amendments. The warnings can only be read in one way--to deny Respondent's right to counsel during the interrogation. This is what Miranda prohibited, and this is why the decision of the Court of Appeals is correct and entirely consistent with the decisions of this Court.

II

GIVEN THE LACK OF A EVIDENTIARY RECORD IN EITHER THE STATE OR FEDERAL COURT, REVIEW OF RESPONDENT'S SECOND STATEMENT IS CLEARLY PREMATURE.

Petitioner also asks this Court to review the admissibility of Eagan's second statement, obtained after he was afforded less defective Miranda warnings. Respondent submits that such issue

is not ripe for consideration by this Court. The remedy granted by the Court of Appeals was to remand this case to the District Court with directions to grant Respondent an evidentiary hearing on the admissibility of the statement given after the second set of Miranda warnings. Petitioner apparently argues that the statement given after these more correct admonitions was admissible and that remand is not warranted. The problem with this argument is that there was no evidentiary hearing held in the District Court initially and there is literally no record of what occurred in the state court. Indeed, the following is the entire record of the state court proceedings on the admissibility of Respondent's confessions:

> Comes now the State of Indiana by its Prosecuting Attorney, by Deputy Prosecutor, Daniel Bella, and comes also the Defendant, Gary James Eagen (sic), in his own proper person and by Counsel, David Schneider, in open court, and this cause is submitted on Defendant's Motion to Suppress Written Statements.
>
> Evidence is heard and Arguments are had, and the Court being duly advised, now denies Motions to Suppress.
>
> State Court Record, p. 39.

While Petitioner asks this Court to grant deference to the state court's factual findings, it is perfectly apparent that no factual findings were made in the Indiana courts. There is no transcript of the suppression hearing, and the trial court made no findings of fact. While the Indiana Supreme Court found the statements "voluntary", that Court had no record before it upon which to make such a determination. Even assuming that normally

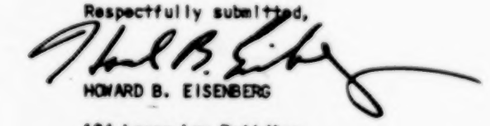
a state appellate court's "findings of facts" would be entitled to deference when a federal court reviews on habeas corpus, certainly the law cannot be that the reviewing federal court is bound to accept the state appellate court's factual determination when there is no record upon which to base such findings and when the judge who actually heard the evidence made no findings of fact. Certainly, it would be unconstitutional for the Court to defer to the state court under such circumstances, cf. Jackson v. Virginia, 443 U.S. 307 (1979) (unconstitutional for state to convict when no reasonable trier of fact could find evidence sufficient).

Given the total lack of evidentiary record upon which to make any decision regarding the second statement, this is clearly not the sort of case which should be considered by this Court in the exercise of its discretion.

CONCLUSION

For the reasons specified herein, Respondent respectfully urges the Court to deny the instant Petition for Writ of Certiorari.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

(3)

No. 88-317

In the Supreme Court of the United States

OCTOBER TERM, 1988

JACK R. DUCKWORTH, PETITIONER

v.

GARY JAMES EAGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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26 pp

QUESTION PRESENTED

The United States will address the following question:

Whether the warnings given to respondent, which included advising him that a lawyer will be appointed "if and when you go to court," complied with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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INTEREST OF THE UNITED STATES

This case presents the question whether warnings given to a suspect, which include advising him that a lawyer will be appointed "if and when you go to court," comply with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). As a matter of practice, federal law enforcement agents do not include such advice when issuing *Miranda* warnings.[1] Nevertheless, inadvertent departures from

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[1] For, example, the standard *Miranda* warnings issued by the Federal Bureau of Investigation provide in pertinent part (FBI/DOJ Form FD-395 (Rev. 6-22-77)):

> Before we ask you any questions, you must understand your rights.
>
> You have the right to remain silent.
>
> Anything you say can be used against you in court.

routine practice occur from time to time, especially when suspects request an elaboration of the warnings. Moreover, the federal government often accepts for prosecution cases referred by state and local authorities, in which suspects have already been interrogated. The Court's analysis and resolution of this question are therefore likely to have a significant effect upon the admissibility of defendant's statements in federal prosecutions.

STATEMENT

1. Late on the evening of May 16, 1982, respondent stabbed a woman nine times after she refused to have sexual relations with him. Respondent left the woman lying naked along the shores of Lake Michigan outside of Hammond, Indiana. After returning to Chicago that night, respondent called a Chicago police officer he knew and reported seeing the naked body of a dead woman. Respondent then led Chicago police officers to the woman, who was crying for help. On seeing respondent accompanying the police, the woman asked respondent why he had stabbed her. Respondent explained to the officers that he had been with the woman earlier that evening but that they had been attacked by several men who had then abducted the woman. Pet. App. A4, A10-A12.

You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

By 7:30 the following morning, the Chicago police officers realized that the crime had been committed in Indiana.[2] They therefore turned the investigation over to the Hammond, Indiana, Police Department, which immediately dispatched two detectives to the lakefront. When respondent told the Hammond detectives that he had been attacked, the detectives took respondent to a police station so that he could file a complaint. After respondent had filled out his report, the detectives asked him to accompany them to police headquarters for further questioning. Pet. App. A4, A12-A13.

At about 11 a.m., Hammond detectives questioned respondent. Before the questioning, the detectives read a waiver form to respondent and asked him if he would sign it. The form provided (Pet. App. A13 n.2; see *id.* at A5):

VOLUNTARY APPEARANCE; ADVICE OF RIGHTS
YOUR RIGHTS

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any

---

[2] In the meantime, respondent had accompanied police officers to the hospital where the woman was taken and then had returned with them to the crime site (Pet. App. A12).

time. You also have the right to stop answering at any time until you talk to a lawyer.

Respondent signed the form and gave the detectives an exculpatory statement (Pet. App. A5).[3]

At roughly 4 p.m. the following day, Hammond detectives again interviewed respondent. Before answering questions, respondent signed another waiver form that provided (Pet. App. A15 n. 3; see *id.* at A6):

WAIVER AND STATEMENT

1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.

2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

[3] The remainder of the form signed by respondent provided (Pet. App. A13 n.2 (brackets in original)):

WAIVER

I, [*Gary Eagan*] have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers * * * In [sic] regard to an investigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so.

Prior to any questioning, I was furnished the above statement of my rights * * *. I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.

4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

5. That if I cannot hire an attorney, one will be provided for me.

After reading and signing that form, respondent confessed to stabbing the woman. The following day respondent led the police to the area near Lake Michigan where he had discarded the knife he had used as well as several items of clothing. The knife and clothing were recovered at that location. Pet. App. A6, A17.

2. At trial, respondent sought to exclude testimony relating to the substance of his two statements to the Hammond police as well as the knife and clothing that were recovered. After conducting a suppression hearing, the trial court denied the motion. The statements and the physical evidence were admitted at trial, and respondent was convicted of attempted murder.[4] Respondent was sentenced to a term of 35 years' imprisonment. Pet. App. A6. The Supreme Court of Indiana affirmed respondent's conviction on direct appeal. *Eagan* v. *State*, 480 N.E.2d 946 (Ind. 1985).

3. Respondent thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. Respondent claimed, among other things, that his confession was inadmissible because the first waiver form he signed did not comply with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court denied the petition, concluding that the record "clearly manifests adherence to *Miranda* * * * especially as to the so-called second statement" (Pet. App. A52).

[4] The jury acquitted respondent of rape (Pet. App. A6).

4. A divided panel of the court of appeals reversed (Pet. App. A3-A48). The majority relied on *United States ex rel. William* v. *Twoomey*, 467 F.2d 1248, 1250 (7th Cir. 1972), which had condemned, as " 'misleading and confusing,' " a warning identical to the one given prior to respondent's first statement, *i.e.*, the advice that a lawyer will be appointed " 'if and when you go to court' " (Pet. App. A7 (citations omitted)). The court explained (Pet. App. A8) that

> [t]he warning suggests erroneously that only those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait. This language further implies that if the accused does not "go to court," i.e.[,] the government does not file charges, the accused is not entitled to an attorney at all.

The court concluded that the warning was "defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation" (Pet. App. A8 (citation omitted)), and that the warning's "confusing linkage of an indigent's right to counsel before interrogation with a future event * * * violates *Miranda*" (Pet. App. A8).

Turning to whether respondent's inadmissible first statement tainted his later confession, the court surmised that "[a]s a result of the first warning, [respondent] arguably believed that he could not secure a lawyer during interrogation" and that the second warning "did not explicitly correct this misinformation" (Pet. App. A9). Accordingly, the court remanded the case for a determination whether respondent had knowingly and intelligently waived his right to the presence of an attorney at the second police interview (*ibid.*).

Judge Coffey dissented. Agreeing with those courts of appeals that have upheld warnings identical or similar to the first set of warnings given to respondent,[5] Judge Coffey rejected the majority's "technical and unrealistic application of *Miranda*" and concluded that the initial warnings were constitutionally adequate (Pet. App. A19). Since respondent was told explicitly that he had the right to consult with an attorney before questioning, and to have an attorney present during questioning even if he could not afford to hire an attorney, the fact that an attorney could not be provided on the spot necessarily informed respondent that he need not submit to immediate questioning (Pet. App. A19-A27). "[A]fter evaluating the totality of the information given [respondent]," Judge Coffey concluded (Pet. App. A35) that respondent

> was clearly informed that he had the right to talk to an attorney before the police questioned him, even if he couldn't personally afford to retain one and was specifically advised of his right to appointed counsel.

Even assuming respondent's first statement was inadmissible under *Miranda*, Judge Coffey concluded that a remand was unnecessary because the record showed that respondent's confession was properly received into evidence.[6] Respondent's first statement had been made voluntarily and the warnings he received before his second interview cured any misunderstanding that may have arisen from the first set. Finally, Judge Coffey contended

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[5] See, *e.g.*, *United States* v. *Contreras*, 667 F.2d 976 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *Wright* v. *North Carolina*, 483 F.2d 405 (4th Cir. 1973), cert. denied, 415 U.S. 936 (1974); *Massimo* v. *United States*, 463 F.2d 1171 (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973); *United States* v. *Lacy*, 446 F.2d 511 (5th Cir. 1971).

[6] Judge Coffey concluded that any error in admitting respondent's initial exculpatory statement was harmless (Pet. App. A46).

that the state trial court had implicitly found that respondent had knowingly and voluntarily waived his *Miranda* rights before confessing and that that factual finding, which the record amply supported, was entitled to a presumption of correctness under 28 U.S.C. 2254(d). Pet. App. A41-A46.

SUMMARY OF ARGUMENT

The warnings given to respondent before his first interview with the Hammond police satisfied the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The warnings contained all the advice the *Miranda* Court required. The only ground for objection was that in addition to the warnings required by *Miranda*, the Hammond police advised respondent that a lawyer would be appointed for him "if and when you go to court." That additional statement did not undermine the effect of the other warnings. The statement about the appointment of counsel was entirely accurate and did not in any way suggest that only those suspects able to retain counsel had the right to consult counsel before questioning. As most federal and state courts have concluded, informing a suspect that an attorney cannot be appointed for him until he appears in court does not render *Miranda* warnings inadequate as long as the suspect is also told that he has the right to speak with an attorney before questioning and to have him present during questioning.

Advising respondent that a lawyer will be appointed "if and when you go to court," in the context of otherwise complete warnings, did not impermissibly suggest that counsel would not be appointed until after questioning. The advice about the timing of the appointment linked the appointment of counsel with a future event – respondent's initial appearance in court – but the warnings as a whole made clear that questioning would not occur before respondent had an opportunity to consult with counsel unless respondent chose to waive that right. Contrary to the court of appeals' view, we submit that informing a suspect that a lawyer will be appointed "if and when you go to court" is not misleading as long as the suspect is effectively told, as was respondent, that he need not submit to any questioning until he has an attorney appointed for him and has had an opportunity to consult with that attorney.

ARGUMENT

RESPONDENT WAS ADEQUATELY INFORMED OF HIS RIGHTS BEFORE QUESTIONING

A. Advising A Suspect That A Lawyer Will Be Appointed If And When He Goes To Court Does Not Invalidate Otherwise Proper *Miranda* Warnings

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court established certain procedural safeguards to protect the right of an individual, under the Fifth and Fourteenth Amendments, to be free from compelled self-incrimination during custodial interrogation. The Court in *Miranda* concluded that "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (384 U.S. at 467; see *Moran* v. *Burbine*, 475 U.S. 412, 420 (1986)). The requirement that police give suspects the now-familiar *Miranda* warnings before interrogation was intended "[t]o combat this inherent compulsion" (*Moran*, 475 U.S. at 420) by ensuring that suspects are "effectively apprised of [their] rights," and thus are "permit[ted] a full opportunity to exercise the privilege against self-incrimination" (*Miranda*, 384 U.S. at 467). Accordingly, the Court held, a suspect must be informed that "he has the right to remain silent,

that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires" (*id.* at 479).

2. This Court has never required that the *Miranda* warnings be given in the precise form enunciated in the *Miranda* opinion. To the contrary, in *Miranda* itself the Court stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant" (384 U.S. at 476 (emphasis added); see also *id.* at 479). Thereafter, in *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), the Court referred to "the now familiar *Miranda* warnings * * * *or their equivalent*" (*id.* at 297 (emphasis added)). And, in *California* v. *Prysock*, 453 U.S. 355 (1981), the Court, in upholding the adequacy of warnings that were not given in the exact manner prescribed in the *Miranda* opinion, made clear that "the 'rigidity' of *Miranda* [does not] extend[] to the precise formulation of the warnings given a criminal defendant" (*id.* at 359 (citation omitted)), and that "no talismanic incantation [is] required to satisfy its strictures" (*ibid.*). Rather than requiring a "verbatim recital of the words of the *Miranda* opinion," the Court has looked to whether the particular words used "fully conveyed to [a suspect] his rights as required by *Miranda*" (*id.* at 360, 361).

3. The initial set of warnings given to respondent touched all the points required by the *Miranda* decision.[7]

[7] *Miranda* warnings may not have been required at all, as it is not apparent from the record that respondent was "in custody" at the time he first answered questions. The record shows that respondent was interrogated at a police station and had been in the continuous presence of police officers since he first accompanied the Chicago police to the lakefront earlier that morning. Respondent, however, first requested to go to the Hammond police station in order to lodge a formal complaint, an action consistent with his initial exculpatory statement, and he apparently agreed to go to police headquarters for an interview. Moreover, the waiver respondent signed before that interview expressly stated that he was not under arrest and was free to leave at any time, and respondent was not placed in custody until after he gave his first statement. Pet. App. A4, A12-A13, A13 n.2, A15. Under these circumstances, it is not at all clear that, at the time he submitted to the initial interrogation, respondent was subject to a " 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977)). Nevertheless, the State has not argued at any stage of the proceedings that respondent was not in custody, so we do not present that issue as an alternative basis for upholding the admission of respondent's first statement.

The Hammond detectives told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak with an attorney before questioning and to have the attorney present during any interrogation, and that he had "this right to the advice and presence of a lawyer even if [he could] not afford to hire one" (Pet. App. A5). If the detectives had stopped at that point, no objection could possibly be made regarding the adequacy of the warnings. Nevertheless, the court of appeals held that these complete and nearly verbatim *Miranda* warnings were defective because the detectives also explained to respondent that they could not provide him with a lawyer but that one would be appointed "if and when you go to court" (*ibid.*). The court reasoned that by linking an indigent's right to counsel to a future, conditional event, the statement about the appointment of counsel erroneously suggested that "only those accused who can afford an attorney have the right to have one

present before answering any questions" (*id.* at A8). The court also considered that the statement "implie[d] that if the accused does not 'go to court,' i.e.[,] the government does not file charges, the accused is not entitled to [a lawyer] at all" (ibid.). The court thus concluded that the warnings failed adequately to inform respondent of the right to appointed counsel before interrogation.

a. In reaching that conclusion, the court of appeals misjudged the effect of the statement about the timing of the appointment of counsel, particularly in the context of the information conveyed by the entire set of warnings. First, the statement about the appointment of counsel was entirely accurate. A police officer typically has no authority to appoint counsel for a suspect; only a judicial officer can do so at that individual's initial appearance. See Ind. Code Ann. § 35-33-7-6 (Burns 1985); Fed. R. Crim. P. 5(c). *Miranda* "does not require that attorneys be producible on call, or that a Miranda warning include a time table for an attorney's arrival." *Mayzak* v. *United States*, 402 F.2d 152, 155 (5th Cir. 1968). Nor does *Miranda* require that "the officer conducting the interview declare his personal and immediate power to summon an attorney" (*ibid.*). In *Miranda* itself, the Court made clear that it was not suggesting that "each police station must have a 'station house lawyer' present at all times to advise prisoners" (384 U.S. at 474). All that *Miranda* requires is that the suspect be advised that he has the right not to be questioned without a prior opportunity to consult with counsel and an opportunity to have counsel present during questioning. If the police have no authority to provide an appointed counsel – or if they choose not to provide one – all that *Miranda* requires is that the police not interrogate the suspect unless he waives his right to counsel.

If an indigent suspect seeks any clarification or amplification of the *Miranda* warnings at all, it seems likely that his first question will be when a lawyer will be appointed for him. Surely, it cannot be the case that the officers are not permitted to answer that question, or that an accurate answer will result in the suppression of any statements the suspect may make. Here, the detectives anticipated that question and answered it truthfully as part of the warnings themselves. The inclusion of that information as part of the warnings – rather than as a response to a question by the suspect – should not make a difference for purposes of determining whether the suspect's statement should be admitted at trial.

Contrary to the view taken by the court of appeals, the statement about the timing of the appointment of counsel did not suggest that only those suspects able to retain counsel have the right to have counsel present before questioning. The statement itself merely explained the mechanics of appointing counsel. The previous two warnings – that respondent had the right to talk to a lawyer for advice before questioning, and that he had that right to the advice and presence of a lawyer before questioning even if he could not afford to hire one (Pet. App. A5) – made clear that whether he could hire an attorney or not, respondent had the right to the advice and presence of an attorney before the police could question him. That right to consult with counsel before questioning was reconfirmed when respondent was told that if he chose to answer questions "without a lawyer present" he could stop the interview "at any time until [he has] talked to a lawyer" (*ibid.*). Telling a suspect that an attorney cannot be appointed for him until he goes to court does not vitiate the effectiveness of a warning that he has a right not to be questioned without an attorney being present. It simply

makes clear that until the indigent suspect goes to court and an attorney is appointed for him, the police may not question him unless he waives his right to counsel.[8]

The challenged statement about the appointment of counsel did not suggest that respondent's rights under *Miranda* were somehow conditional. The detective's statement that an attorney would be appointed for respondent "if and when you go to court" meant only that, if respondent requested an attorney before questioning, one would be appointed by the court unless charges were not filed, in which case respondent would be released and not brought to court at all.[9] In other words, the warnings made clear that if respondent chose not to waive his right to consult with counsel before questioning, one of two series of events would occur: either the police would defer questioning until charges were filed, the court appointed an attorney, and that attorney conferred with respondent; or, the police would defer questioning, choose not to file charges, and thus release respondent from custody without questioning him at all. Contrary to the court of appeals' view (Pet. App. A8), nothing in the detective's use

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[8] Indeed, the *Miranda* Court acknowledged that the practice of the Federal Bureau of Investigation, at that time, of informing suspects "of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge" (384 U.S. at 486 (emphasis in original) (internal quotations omitted)), was "consistent with the procedure [the Court] delineate[d]" (*id.* at 484).

[9] Under Indiana law, counsel is appointed at the defendant's initial hearing in court, Ind. Code Ann. § 35-33-7-6 (Burns 1985), and formal charges must be filed at or before that hearing, *id.* § 35-33-7-3(a). In the federal system, the defendant's initial hearing, at which counsel is appointed, can occur before the filing of any indictment or information, Fed. R. Crim. P. 5(a), (c).

of the word "if" undercut the plain message of the warnings—that respondent had the right not to answer questions until an attorney, whether retained or appointed, could be present.

b. Most state and federal courts agree that informing a suspect that an attorney cannot be appointed for him until he appears in court (or that an attorney will be appointed at another time) does not render *Miranda* warnings inadequate, as long as the suspect is also told that he has the right to speak with an attorney before questioning and to have him present during questioning.[10] Taken together, the two statements explain to the suspect that "he [has] the right to put off answering any questions until the time

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[10] See, *e.g.*, *De La Rosa* v. *Texas*, 743 F.2d 299, 302 (5th Cir. 1984), cert. denied, 470 U.S. 1065 (1985); *United States* v. *Contreras*, 667 F.2d 976, 979 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *United States ex rel. Placek* v. *Illinois*, 546 F.2d 1298, 1300-1301 (7th Cir. 1976); *Wright* v. *North Carolina*, 483 F.2d 405, 406-407 (4th Cir. 1973), cert. denied, 415 U.S. 936 (1974); *Massimo* v. *United States*, 463 F.2d 1171, 1174 (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973); *Tasby* v. *United States*, 451 F.2d 394, 398-399 (8th Cir. 1971), cert. denied, 405 U.S. 992 (1972); *United States* v. *Lacy*, 446 F.2d 511, 513 (5th Cir. 1971) (per curiam); *United States* v. *Lamia*, 429 F.2d 373, 376-377 (2d Cir.), cert. denied, 400 U.S. 907 (1970); *Klingler* v. *United States*, 409 F.2d 299, 308 (8th Cir.), cert. denied, 396 U.S. 859 (1969); *Coyote* v. *United States*, 380 F.2d 305, 308 (10th Cir.), cert. denied, 389 U.S. 992 (1967); *Schade* v. *State*, 512 P.2d 907, 915-916 (Alaska 1973); *State* v. *Maluia*, 56 Haw. 428, 431-435, 539 P.2d 1200, 1205-1207 (1975); *Emler* v. *State*, 259 Ind. 241, 243-244, 286 N.E.2d 408, 410-411 (1972); *People* v. *Campbell*, 26 Mich. App. 196, 201-202, 182 N.W.2d 4, 6-7 (1970), cert. denied, 401 U.S. 945 (1971); *Harrell* v. *State*, 357 So. 2d 643, 645-646 (Miss. 1978); *People* v. *Swift*, 32 A.D.2d 183, 186-187, 300 N.Y.S.2d 639, 643-644 (1969), cert. denied, 396 U.S. 1018 (1970); *Rowbotham* v. *State*, 542 P.2d 610, 618-619 (Okla. Crim. App. 1975); *Jones* v. *State*, 69 Wis. 2d 337, 343-345, 230 N.W.2d 677, 682-683 (1975).

when he [does] have an appointed attorney." *United States* v. *Lacy*, 446 F.2d 511, 513 (5th Cir. 1971) (per curiam). As the Second Circuit explained under identical circumstances, "[t]he only conclusion [the suspect] would have been justified in reaching on the basis of the warning was that, since he was clearly entitled to have a lawyer present during questioning, and since no lawyer could now be provided, he could not now be questioned." *Massimo* v. *United States*, 463 F.2d 1171, 1174 (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973).

A minority of federal and state courts, including the court of appeals in this case, have held such warnings inadequate.[11] Those courts have disapproved the departure from the formulation sanctioned in *Miranda* and have generally reasoned, as did the court of appeals in this case, that inserting conditional language into *Miranda* warnings undercuts the advice that the suspect has the right to appointed counsel before any questioning. The insistence on strict adherence to the language of the *Miranda* warnings, however, cannot be squared with this Court's admonition in *Prysock* that "the 'rigidity' of *Miranda* [does not] extend[] to the precise formulation of the warnings given to a criminal defendant" (453 U.S. at 359). Small variations in the language used "are far less important than whether the differences threaten achievement of the purpose of the warnings." *United States* v. *Sanchez*, No. 88-1706 (7th Cir. Sept. 30, 1988), slip op. 4. And, as we have discussed above, the minority view is not only unjustifiably rigid, it ignores the more sensible and straightforward interpretation of the warnings taken as a whole.

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[11] See, *e.g.*, *Gilpin* v. *United States*, 415 F.2d 638, 640-641 (5th Cir. 1969); *Lathers* v. *United States*, 396 F.2d 524, 535-536 (5th Cir. 1968); *Square* v. *State*, 283 Ala. 548, 550, 219 So. 2d 377, 378-379 (1969); *Moore* v. *State*, 251 Ark. 436, 442-443, 472 S.W.2d 940, 944 (1971); *Commonwealth* v. *Johnson*, 484 Pa. 349, 352-357, 399 A.2d 111, 112-114 (1979); *State* v. *Creach*, 77 Wash. 2d 194, 199-200, 461 P.2d 329, 332-333 (1969).

B. Advising Respondent That A Lawyer Would Be Appointed If And When He Went To Court Does Not Link The Right To Counsel To An Event Occurring After Questioning

1. In *California* v. *Prysock*, *supra*, the Court suggested that *Miranda* warnings would be inadequate "if the reference to the right to appointed counsel was linked [to a] future point in time after the police interrogation" (453 U.S. at 360). The court of appeals relied on that statement from *Prysock* in finding fault with the advice given by the police in this case. But there is a critical difference between the warning at issue in this case and the warning that the Court in *Prysock* said would be improper. *Prysock* criticized a suggestion that counsel would be appointed "after police questioning." In this case, there was no suggestion that the appointment of counsel would occur after questioning. To the contrary, the warning made clear that, absent a waiver, an indigent suspect had the right to consult with counsel *before* questioning, regardless of when the appointment occurred.

A review of the cases cited by the *Prysock* Court—*United States* v. *Garcia*, 431 F.2d 134 (9th Cir. 1970) (per curiam), and *People* v. *Bolinski*, 260 Cal. App. 2d 705, 67 Cal. Rptr. 347 (1968)—makes it clear that the court of appeals was mistaken in relying on *Prysock* as support for its decision. In *Garcia*, the defendant had been advised that she could "have an attorney appointed to represent you when you first appear before the U.S. Commissioner or the Court" (431 F.2d at 134). The court concluded that the warnings were inadequate because they informed the defendant only of her right to the presence of counsel "when she answered any questions," and not "of her right to counsel before she said [a word]" (*ibid.*). In *Bolinski*, one set of warnings advised the accused that counsel would be appointed "if he was charged" (260 Cal. App. 2d

at 718, 67 Cal Rptr. at 355), and the other set of warnings informed the defendant that an attorney would be appointed after he was transferred to California from his present location in Illinois (260 Cal. App. 2d at 723, 67 Cal. Rptr. at 358). Both sets of warnings were held inadequate because they failed to explain that the accused was entitled to have a lawyer present at the interrogation, let alone that counsel could be appointed for that purpose (260 Cal. App. 2d at 718, 720, 67 Cal. Rptr. at 355, 356).

The flaw in the *Miranda* warnings at issue in *Garcia* and *Bolinski*, therefore, was linking the appointment of counsel to a future event occurring *after interrogation*. The warnings in those cases tended to mislead the indigent suspect by failing to make clear that he could postpone questioning until he had a lawyer. *Prysock* thus casts doubt on the validity only of those warnings that link the appointment of counsel to a future event occurring after interrogation. It does not condemn warnings that simply link the appointment of counsel to some future event.

2. Here, respondent was told that he had the right to talk to a lawyer before any questioning and to have a lawyer present during questioning. He was told that he had this "right to the advice and presence of a lawyer" even if he could not afford one. And he was informed that a lawyer would be appointed for him, if he wished, when he appeared in court. That warning certainly linked the appointment of counsel to a future event—respondent's initial appearance in court—but that statement, taken together with the entire set of warnings, made clear that, absent a waiver, the future event would occur before any questioning. Read as a whole, the warnings did not suggest, let alone state, that respondent would enjoy the right to the advice and presence of a lawyer only after he submitted to questioning. The warnings given to respondent therefore satisfied the requirements of this Court's decision in *Miranda*.

One problem with any close analysis of the language used in pre-interrogation warnings is that focusing on the precise wording used in the warnings tends to obscure the basic point of *Miranda*: to ensure that a suspect does not waive his right to remain silent either because of the pressures inherent in custodial interrogation or because he does not understand that his words can be used against him in court. The *Miranda* warnings are not prescribed by statute or rule, nor are they mandated by the Constitution. The warnings have constitutional significance only because this Court has held that giving a suspect those warnings is one effective way to ensure that the suspect's waiver of his right to remain silent is valid. Therefore, rather than measuring particular warnings against the words of the *Miranda* opinion, the Court should determine whether the warnings in each case provide the suspect with the information he needs to make a constitutionally binding decision to speak with the police. Viewed in that way, the warnings given to respondent were unimpeachable. They advised him, in the clearest possible language, of his right to remain silent; the consequences of waiving that right; the right to consult with counsel before questioning and to have counsel present during questioning if respondent chose to speak with the police; the right to the advice and presence of counsel even if respondent could not afford to hire a lawyer; and the right to stop answering questions at any time. It is hard to credit the claim that, armed with all that information, respondent's waiver of his right to remain silent was nonetheless rendered involuntary because he was told, accurately, that

the police were not authorized to appoint a lawyer for him.[12]

[12] Even assuming the first warnings given to respondent were inadequate under *Miranda*, the court of appeals erred in remanding the case for a determination whether respondent had waived the right to the presence of counsel before confessing to the detectives. In our view, the record shows that respondent had waived that right after receiving proper *Miranda* warnings. First, as even the court of appeals concluded, respondent's confession "was made voluntarily" (Pet. App. A9), and there is no evidence in the record that the detectives acted coercively. See *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986). Second, respondent confessed after receiving complete and accurate *Miranda* warnings. See *Oregon* v. *Elstad*, 470 U.S. 298, 318 (1985). Third, even if there was a flaw in the first warnings, there was no such flaw in the second set, which made clear that respondent had the right to the advice and presence of an attorney before questioning, and that "if [respondent could not] hire an attorney, one will be provided for [him]" (Pet. App. A15 n.3). Under these circumstances, respondent clearly waived the right to the presence of counsel before confessing and thus a remand was unnecessary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1988

No. 88-317

IN THE

Supreme Court of the United States

October Term, 1988

JACK R. DUCKWORTH, *Petitioner,*

v.

GARY JAMES EAGAN, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 22, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 24, 1988.

Before

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HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge
HON. JESSE E. ESCHBACH, Senior Judge*

GARY JAMES EAGAN,	)
	) Appeal from the
Petitioner-Appellant,	) United States District
	) Court for the
No. 86-2178 vs.	) Northern District of
	) Indiana, South Bend
JACK R. DUCKWORTH,	) Division
Warden,	)
	) No. S 86-56
Respondent-Appellee.	) Allen Sharp, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by counsel for the respondent-

*Judge Eschbach did not participate in the vote on the petition for rehearing *en banc*.

appellee in the above-entitled cause, a majority** of the judges on the original panel have voted to deny the petition for rehearing. A vote of the active members of the court having been requested, and a majority*** of the judges in regular active service having voted to deny the petition for rehearing *en banc*, accordingly,

IT IS ORDERED that the aforesaid petition for rehearing, with suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

**Judge Coffey voted to grant a rehearing.

***Judges Posner, Coffey, Easterbrook, and Manion voted to grant a rehearing *en banc*.

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2178

GARY JAMES EAGAN,

Petitioner-Appellant,

v.

JACK R. DUCKWORTH, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. S 86-56—**Allen Sharp**, *Judge*.

ARGUED JUNE 2, 1987—DECIDED MARCH 22, 1988

Before BAUER, *Chief Judge*, COFFEY, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge*.

BAUER, *Chief Judge*. The petitioner, Gary Eagan, appeals from the district court's order denying his petition for a writ of habeas corpus. We reverse and remand.

I.

The petitioner was tried and convicted by a Lake County, Indiana jury of attempted murder for stabbing a woman nine times after she refused to have sexual relations with him.

According to the evidence introduced at trial, Eagan and several companions picked up the woman as they drove through Chicago late on the evening of May 16, 1982. Sometime thereafter, Eagan, his friends and the woman met with several other men, all of whom drove together to Indiana and parked on a beach along the Lake Michigan shoreline. The woman then had sexual relations with several of the men in the group, although it is not clear from the record whether she was coerced into the sexual activities or consented upon the payment of money. Eagan, his original companions, and the woman then separated from the larger group. Shortly thereafter, they returned to the same Lake Michigan beach where Eagan and his companions apparently desired to continue their sexual activities with the woman. She refused. A struggle ensued, which ended with Eagan stabbing the woman nine times and then fleeing.

Eagan and his companions returned to Chicago where Eagan called a Chicago policeman he knew to report that he had seen the naked body of a dead woman lying on the beach along the shores of Lake Michigan. Eagan subsequently led the Chicago police to the woman. The police found the woman screaming for help, and upon seeing Eagan, the woman asked him in the presence of the police why he had stabbed her. Eagan explained to the police that he had been with the woman earlier that evening but had been attacked by several men who abducted the woman. The Chicago police turned the matter over to the Hammond, Indiana police, who requested that Eagan accompany them to the Hammond police station for questioning.

At approximately 11:00 a.m. the following morning, May 17, 1982, detectives from the Hammond Police Department questioned Eagan. Before questioning, Hammond police detectives read to Eagan, and asked him to sign, a waiver form which provided:

YOUR RIGHTS

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.[1]

(Emphasis added.) During the ensuing interview, Eagan gave an exculpatory recitation of his activities the night of the crime.

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[1] The rest of the waiver signed by Eagan provided:

WAIVER

> I [petitioner filled in his name] have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers of the Hammond, Indiana Police Department, in regard to an investigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so.
>
> Prior to any questioning, I was furnished the above statement of my rights at [11:14 a.m.] on [5/17/82] at [H.P.D.] by [Roger Raskosky and Thomas Baughman] of the Hammond Police Department. I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.
>
> Signed [Eagan]

At approximately 4:00 p.m. the following day, May 18th, the Hammond police interviewed Eagan for a second time. Before this interrogation, Eagan signed another waiver form which stated:

> 1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.
>
> 5. That if I do not hire an attorney, one will be provided for me.

After reading and signing this waiver form, Eagan admitted that he had stabbed the woman and then led police to the area along the Lake Michigan shoreline where he had discarded the knife used in the stabbing as well as several items of clothing. At trial, the state court admitted Eagan's confession, the knife, and the clothing. The jury found Eagan guilty of attempted murder but acquitted him of rape. The court sentenced him to 35 years imprisonment.

II.

Eagan argues that the police obtained his confession in violation of his constitutional right against self-incrimination because the first waiver form he signed failed to apprise him adequately of his right to a lawyer, if he so desired, before the police questioned him. Specifically, Eagan claims that the "if and when you go to court" passage in the sixth sentence of the waiver form was confusing and misleading and that he did not understand that the court would appoint him counsel before police interrogation.

In *United States ex rel. William v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), this court confronted a warning identical to the one issued to Eagan. In *Twomey*, the warning given by an Indiana State Trooper stated that the habeas corpus petitioner, Williams, had the "right to the advice and presence of an attorney whether you can afford to hire one or not. We have no way of furnishing you with an attorney, but one will be appointed for you, if you wish, if and when you go to court." *Id.* at 1249-1250 n.1. We stated that

> the warning given here was not an "effective and express explanation;" to the contrary, it was equivocal and ambiguous. In one breath appellant [Williams] was informed that he had the right to appointed counsel during questioning. In the next breath, he was told that counsel could not be provided until later. In other words, the statement that no lawyer can be provided at the moment and can only be obtained if and when the accused reaches court substantially restricts the absolute right to counsel previously stated; it conveys the contradictory message that an indigent is first entitled to counsel upon an appearance in court at some unknown, future time. The entire warning is therefore, at best, misleading and confusing and, at worst, constitutes a subtle temptation to the unsophisticated, indigent accused to forego the right to counsel at this critical moment.

Id. at 1250.

Although over fifteen years have passed since this court rendered *Twomey*, it remains the "seminal case in this circuit dealing with the issue of ambiguously worded *Miranda* warnings," *Emler v. Duckworth*, 549 F.Supp. 379, 381 (N.D. Indiana, 1982). We see no reason to stray

from its teachings now. The "internal inconsisten[cies]", *United States ex rel. Placek v. State of Illinois*, 546 F.2d 1298, 1300 (7th Cir. 1976), inherent in this type of warning are no less ambiguous and misleading today than they were fifteen years ago. The "if and when" language limits and conditions an indigent's right to counsel on a future event. The warning suggests erroneously that only those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait. This language further implies that if the accused does not "go to court," i.e. the government does not file charges, the accused is not entitled to an attorney at all.

Thus, this warning is constitutionally defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation. *Twomey*, 467 F.2d at 1250. We caution that our holding does not require that the police furnish an accused with counsel immediately. *See, e.g., Placek*, 546 F.2d at 1300. Nor do we urge police officers to make this appointment. The problem with the warning given Eagan is not its lack of immediacy but its confusing linkage of an indigent's right to counsel before interrogation with a future event. This potential misunderstanding violates *Miranda*. *California v. Prysock*, 453 U.S. 355, 360 (1981).[2]

III.

Under *Oregon v. Elstad*, 470 U.S. 298 (1985), Eagan's second statement was not necessarily tainted by the initial infirm warning. This conclusion, however, does not obviate our responsibility to determine whether Eagan's waiver of rights before the second statement was knowing and intelligent—the defendant's main argument on ap-

[2] Interestingly, in *Richardson v. Duckworth*, 834 F.2d 1366, 1371 (7th Cir. 1987), Judge Coffey cited *Twomey* with approval (although he distinguished it from *Richardson*) for the precise principle the majority now affirms and he attacks.

peal. Although Eagan's second statement was made voluntarily, this conclusion does not end our inquiry. In addition to being voluntary, a "waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Eagan argues that his second waiver was not knowingly and intelligently given because of the misapprehension caused by the initial warning, and the failure of the second warning to correct that misapprehension. This argument is not defeated by a determination that the second statement probably was not tainted by the improper warnings given prior to the first statement. When a defendant gives a statement while in custody, the government has the burden of showing that the defendant knowingly and intelligently waived his rights. *United States ex rel. Williams v. Twomey*, 467 F.2d 1248, 1251 (7th Cir. 1972). Whether a waiver was knowing and intelligent is a question of fact, *Perri v. Director, Department of Corrections*, 817 F.2d 448, 451 (7th Cir. 1987), requiring an evaluation of all the surrounding circumstances. *Elstad*, 410 U.S. at 318.

As a result of the first warning, Eagan arguably believed that he could not secure a lawyer during interrogation. The second warning did not explicitly correct this misinformation. Of course, we know very little about the factual circumstances surrounding these events because the state courts did not directly examine this issue. These are not matters for appellate determination and have not been adequately determined below. Accordingly, we remand for a determination of whether the defendant knowingly and intelligently waived his right to the presence of an attorney during the second interrogation.

REVERSED AND REMANDED.

COFFEY, *Circuit Judge*, dissenting. This court recently observed that "the Supreme Court has never mandated that law enforcement officers use certain 'magic words' to inform a defendant of his rights." *Richardson v. Duckworth*, 834 F.2d 1366, 1370 (7th Cir. 1987). Nonetheless, the majority reaffirms *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), resurrecting "an overly technical application of the *Miranda* rule." *Id.* at 1253 (Pell, J., dissenting). The majority's application of *Twomey* is inconsistent with the reasoning and holding of *Richardson*, as well as our earlier decision in *United States v. Johnson*, 426 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 842 (1970), and is contrary to the great weight of authority. Thus, I respectively dissent. Further, assuming *arguendo*, that *Twomey* retains its validity, rendering the petitioner's initial statement inadmissible since it was made in technical violation of *Miranda*, I would still affirm the district court. The petitioner received a subsequent constitutionally sufficient *Miranda* warning and voluntarily and knowingly waived his rights before confessing to stabbing the victim.

I.

The petitioner was tried and convicted before a jury in Lake County, Indiana, of attempted murder.[1] According to the evidence, Eagan and at least two companions picked up the woman as they drove through South Chicago, Illinois, late on the evening of May 16, 1982. The victim testified that sometime thereafter she, Eagan, and his companions, met some other men and decided to drive to Indiana and

[1] The record filed with the court on appeal did not contain the transcript of the November 19, 1982, pre-trial suppression hearing. Fortunately, with the aid and urging of this court's clerk, we have recently been provided with the suppression hearing transcript. The supplemented record before us provides us with the facts most necessary for us to decide the petitioner's federal claims, thus I would reject Eagan's assertion that he is entitled to an evidentiary hearing in the district court.

visited on a beach on the Lake Michigan shoreline. Sometime thereafter, the victim had sexual relations with at least three of the men in the group, although it is not clear from the record whether she was coerced or consented to engaging in the sexual activities. Eventually, it appears that the defendant, his companions, and the woman left the lakefront but returned later to the same beach area. The woman refused to engage in further sexual relations at which time, according to the victim's testimony, the defendant repeatedly stabbed her (9 times) and left the scene with his companions.

The petitioner returned to Chicago where he called the Chicago police and requested to talk to Officer LoBianco, with whom he was acquainted. LoBianco testified at trial that he and another officer went to an apartment building in Chicago and met Eagan. Eagan, denying his guilt, informed LoBianco that "he would like to take [him] to an area where he spotted a body." According to LoBianco's testimony, Eagan further elaborated, stating that "he found a naked woman dead" at the lakefront. LoBianco's earlier deposition testimony regarding his conversation with Eagan on the way to the lakefront was read into the trial record at this time as follows:

> "I kept asking him, 'Are you sure what you're telling me is true? Do you know what you are saying to me?', all this stuff. I kept asking him and asking him. This was a story about a homicide. What is a homicide? It's hard to say. So she was just laying there not breathing, nothing. No movement on her or nothing. And, during the whole—going to the area this is when this conversation was going on. Okay, at that time he was just somebody that found a woman, okay, dead in the weeds."

The petitioner led the Chicago police to the exact location in a wooded area along Lake Michigan in Indiana, a short distance from the Illinois-Indiana border where the police found the victim moaning and screaming for help. LoBianco further testified that upon seeing the peti-

tioner, the victim spoke up, and addressing her statements to Eagan, stated: "Why did you stab me? Why did you stab me?"

At this time LoBianco's partner called an ambulance and the victim was conveyed to a hospital. Eagan accompanied the officers to the hospital where he was initially questioned concerning his alleged discovery of a nude woman's body. The petitioner explained to LoBianco that he had come across the nude body while "he was out there for a party." At approximately 7:30 a.m. two Chicago police detectives took over the investigation and escorted Eagan back to the lakefront. At that time, the Chicago police, noting that the crime had been committed in Indiana, turned the matter over to the Indiana authorities for further investigation. Hammond Police Detectives Raskosky and Baughman arrived on the scene at approximately 8 a.m. the morning of May 17.

Officer Raskosky, while testifying at trial in answer to an interrogatory, stated that initially he believed that Eagan was only a possible witness to the stabbing. Raskosky further testified that the petitioner informed him that:

> "he [Eagan] had been attacked earlier in the evening by several subjects. He was beaten, and he requested that he wanted to make out a police report, obtain a warrant for those subjects. So he voluntarily went to the Robertsdale Station [a Hammond police station] to make out a report with Officer Lora."

Officer Lora transported the defendant to the Hammond police station.

While at the police station, Eagan filed a battery complaint stating he had been with the victim at the lakefront and that she departed from the area with three men in a van. He further reported that these same three individuals in the van threw bottles at his car and attacked him, striking him in the face. Subsequently, Detectives Raskosky and Baughman arrived at the Hammond (Robertsdale) station and asked Eagan "if he would willingly come to the main station" to make a statement. Eagan agreed, and the detectives transported the petitioner to the Hammond police headquarters.

At 11:14 a.m. the morning of May 17, before Detectives Raskosky and Baughman questioned the petitioner about the stabbing of the woman, Detective Raskosky informed the petitioner of his constitutional rights, reading the following warning from a Hammond Police Department form entitled "Voluntary Appearance; Advice of Rights"[2]:

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[2] Officer Raskosky testified at the November 19, 1982, pre-trial suppression hearing that the warning from the "Voluntary Appearance" form was given only to those individuals who "voluntarily appeared to give a statement." The completed "Voluntary Appearance" form provided:

> *"VOLUNTARY APPEARANCE; ADVICE OF RIGHTS*
>
> *YOUR RIGHTS*
>
> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.
>
> *W A I V E R*
>
> I, [*Gary Eagan*] have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers of the Hammond, Indiana Police Department, In [sic] regard to an investigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so.
>
> Prior to any questioning, I was furnished the above statement of my rights at [*11:14* a.m.] on [*5-17-82*] at [*H.P.D.*] by
> (time) (date) (place)

(Footnote continued on following page)

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer."

(Emphasis added). In his initial statement Eagan provided the detectives with an exculpatory recitation of his activities the night of the crime consistent with those recounted in his battery complaint. The petitioner admitted that he had been with the woman earlier in the evening and had engaged in sexual activity with her, but stated that she left him to join "three other guys" in a van. Again, Eagan asserted that these same men attacked him later that same morning.

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[8] *continued*

[*ROGER RASKOSKY & THOMAS BAUGHMAN*] of the Hammond Police Department. I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Signed [*Gary J. Eagan*]

[11:16 a.m. 5/17/82 H.P.D.]
(time) (date) (place)

Witness [*Sgt. Roger A. Raskosky*]

Witness _____

Okey [sic] to take your photo: [*Gary Eagan*]

Date _____ Time _____"

Eagan subsequently was placed in custody in the "record lock-up" located in the basement of the Hammond police headquarters. Some 29 hours later on the following day, May 18th, Detectives Raskosky and Baughman interviewed the petitioner for a second time. Detective Baughman testified at trial that the petitioner was again fully advised of his rights at 4:21 p.m. by Detective Raskosky who read him a waiver of rights form,[3] which provided:

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[3] Officer Raskosky testified at the pre-trial suppression hearing that after an individual is arrested or placed in custody, he/she is orally advised of his/her rights using the "Waiver and Statement" form instead of the "Voluntary Appearance" form. Compare the following "Waiver and Statement" form with the "Voluntary Appearance" form in footnote 2:

"*WAIVER AND STATEMENT*

HAMMOND POLICE DEPARTMENT

CASE # [*82-14893*]

DATE [*5-18-82*] PLACE [*H.P.D.*] TIME STARTED [*4:21 P.M.*]

I, [*GARY EAGAN*], AM [*22*] years old. My date of birth is [*5-23-59*], I live at [*13302 BALTIMORE AVE.*]. The person to whom I give the following voluntary statement, [*SGT. RASKOSKY*] [BAUGHMAN], having identified and made himself known as a [*DETECTIVES*] of the Hammond Indiana Police Department, DULY WARNED AND ADVISED ME, AND I KNOW:

1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.

2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.

(Footnote continued on following page)

"1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.

2. That I have the right to consult with an attorney of my own choice before saying anything, and

[3] *continued*

4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

5. That if I cannot hire an attorney, one will be provided for me.

WAIVER

I have read the foregoing statement of my rights and I am fully aware of the said rights. I do not desire the services of any attorney at this time and before proceeding with the making of any statement or during the course of any conversation with any police officers, and hereby waive said right. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me to procure any statement or induce any conversation. That the statement I am about to give is the truth and that I give it of my own free will.

(Signed) [*Gary J. Eagan*]

TIME [*4:23 p.m.*] DATE [*5-18-82*]

I have read each page of this statement and waiver, consisting of [*2*] pages, each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at [*5:25 PM*] M. on the [*18*] day of [*MAY*], 19[*82*].

(Signed) [*Gary J. Eagan*]

CERTIFICATION

I hereby certify that the foregoing warning and waiver was explained and read by me to the above signatory, and that he also read it and has affixed his signature hereto in my presence, and that I will so testify in court.

[*Sgt. Roger A. Raskosky*]"

that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.

4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

5. That if I cannot hire an attorney, one will be provided for me."

Eagan then read the waiver form aloud to the officers and Raskosky asked him whether he understood his rights. Eagan replied he did. Detective Baughman testified that Eagan appeared to understand his rights. Both detectives observed him sign the waiver of rights form at 4:23 p.m. An hour later, at 5:25 p.m., Eagan completed his second statement, giving a full confession concerning the stabbing of the woman. The following morning, May 19, Eagan led Officers Raskosky, Baughman and Myszak to the area along the Lake Michigan shoreline where the police recovered the knife used in the stabbing of the victim as well as several items of her clothing which Eagan had previously discarded. At the state trial, the court received Eagan's two statements and also the knife and clothing the police had recovered, over the petitioner's objection. The jury found the petitioner guilty of attempted murder but acquitted him of rape; he was sentenced to a term of 35 years' imprisonment.

II.

In spite of the fact that Eagan initially (voluntarily) contacted the police and reported seeing a nude, dead body and in light of the record revealing that Eagan on at least two occasions waived his *Miranda* rights and confessed, the majority holds that the petitioner's initial *Miranda* warning was constitutionally defective and tainted his sec-

ond waiver of rights "because of the misapprehension caused by the initial warning."[4] I disagree and would hold that the initial warning given Eagan was constitutionally sufficient. Further, I would overrule *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), and *United States v. Cassell*, 452 F.2d 533 (7th Cir. 1971),[5] to the extent these cases hold otherwise and join Judge Pell in his rejection of "an overly technical application of the *Miranda* rule." *Twomey*, 467 F.2d at 1253 (Pell, J., dissenting).

In *Twomey*, the defendant, Williams, was given the following *Miranda* warning:

> "Before we ask you any questions, it is our duty as police officers to advise you of your rights and to warn you of the consequences of waiving your rights.
>
> You have the absolute right to remain silent.
>
> Anything you say to us can be used against you in court.

[4] Detective Raskosky testified at the pre-trial hearing that the petitioner was not under arrest at the time he gave the initial exculpatory statement. Under these circumstances, Eagan would not have been entitled to *Miranda* warnings nor would the law enforcement officers have been obligated to apprise him of his rights. *See, e.g., California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517 (1983); *U.S. v. Bush*, 820 F.2d 858 (7th Cir. 1987). Because I would hold that Eagan was initially properly apprised of his rights, and in the alternative that the admissibility of the petitioner's initial statement is irrelevant to our holding in light of *Elstad*, the issue of whether the petitioner was actually in custody at the time he provided the Hammond police with an exculpatory tale of the events which occurred during the late evening and early morning hours of May 16 and 17, 1982, need not concern us.

[5] In *Cassell*, an earlier panel of this court held that the following warning was constitutionally deficient: "If you cannot afford a lawyer and want one, a lawyer will be appointed for you if and when you go to court or before a United States Commissioner."

> You have the right to talk to an attorney before answering any questions and to have an attorney present with you during questioning.
>
> You have this same right to the advice and presence of an attorney whether you can afford to hire one or not. *We have no way of furnishing you with an attorney, but one will be appointed for you, if you wish, if and when you go to court.*
>
> If you decide to answer questions now without an attorney present, you will still have the right to stop answering at any time. You also have the right to stop answering any time until you talk to an attorney."

Twomey held, as does the majority today, that this warning is equivocal and ambiguous and constitutes a *per se* violation of *Miranda*. This formalistic, technical and unrealistic application of *Miranda* has been soundly rejected by the vast majority of other circuits deciding the issue, i.e., the Fifth, Second, Fourth, Eighth, Tenth and Eleventh Circuits.

In *United States v. Lacy*, 446 F.2d 511 (5th Cir. 1971), the Fifth Circuit held that a *Miranda* warning, similar to the warning given Eagan, was constitutionally sufficient. The *Miranda* warning provided:

> "Before we ask you any questions, you must understand your rights; you have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice *before* we ask you any questions, and to have him with you during the questioning. You have this right to the advice and *presence* of a lawyer, even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. *You also have the right to stop answering at any time until you talk to a lawyer.*"

Id. at 512-13 (emphasis in original as well as added). The *Lacy* court held that "this warning comports with the requirements of *Miranda*," and observed:

> "That the attorney was not to be appointed until later *seems immaterial since Lacy was informed that he had the right to put off answering any question until the time when he did have an appointed attorney.*"

Id. at 513 (emphasis added).[6]

The Second Circuit, in *Massimo v. United States*, 463 F.2d 1171, 1174 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973), adopted the logical and realistic approach taken by the Fifth Circuit in *Lacy* and specifically rejected this court's contrary conclusion in *Cassell*. In *Massimo*, the defendant, again like Eagan, was advised:

[6] But *see Fendley v. United States*, 384 F.2d 923 (5th Cir. 1970) (holding that "the defendant was not advised, as *Miranda* requires, of his right to have *court-appointed* counsel present *during the interrogation*," when an FBI agent advised the defendant that "if he did not have any money to obtain an attorney that the Judge, the Court, would appoint one for him when he went to court."); *Lathers v. United States*, 396 F.2d 524 (5th Cir. 1968) (The officer's warning to the defendant provided that "if he was unable to hire an attorney the Commissioner or the Court would appoint one for him." The court held that this warning violated the "edicts of *Miranda*."). Initially, one observes that *Lacy* failed to mention *Fendley* and as one court stated, *Lacy* "appears to have overruled [*Fendley*] *sub silento*." *United States v. Olivares-Vega*, 495 F.2d 827, 829 n.8 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974). Further, *Lacy* cited to *Lathers*, noting that its "twin requirements were met: the defendant was informed that (a) he had the right to the presence of an attorney and (b) that the right was to have an attorney 'before he uttered a syllable.' " Thus, it appears that *Lacy* rejected the premise, implicit in *Fendley* and *Lathers*, that a *Miranda* warning was *per se* insufficient if the warning contained language conditioning an indigent's right to appointed counsel on some future event. The continuing validity of *Lathers* has also been questioned by the Eleventh Circuit in *United States v. Contreras*, 667 F.2d 976, 978-79 (11th Cir.), *cert. denied*, 459 U.S. 849 (1982). It appears the *Contreras* court found that *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806 (1981), effectively overruled *Lathers*.

> "(a) You have the right to remain silent.
>
> (b) Anything you say can be used against you in court.
>
> (c) You have the right to talk to a lawyer for advice before we ask you any question and to have him with you during questioning.
>
> (d) You have the same right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of furnishing you a lawyer but one will be appointed for you, if you wish, if and when you go to court.*
>
> (e) If you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Id. at 1173. The court held that this warning was "adequate" under *Miranda*, stating:

> ". . . Massimo was clearly warned that he could have a lawyer present *during* questioning. *The only conclusion Massimo would have been justified in reaching on the basis of the warning was that, since he was clearly entitled to have a lawyer present during questioning and since no lawyer could now be provided, he could not now be questioned.*"

Id. at 1174 (emphasis added).[7]

Similarly, in *Wright v. North Carolina*, 483 F.2d 405 (4th Cir. 1973), *cert. denied*, 415 U.S. 936 (1974), the Fourth Circuit found the reasoning in *Lacy* and *Massimo* persuasive and sustained the sufficiency of the warning

[7] *See also United States v. Lamia*, 429 F.2d 373 (2d Cir.), *cert. denied*, 400 U.S. 907 (1970); *United States v. Carneglia*, 468 F.2d 1084 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *United States v. Olivares-Vega*, 495 F.2d 827 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Floyd*, 496 F.2d 982 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States v. Burns*, 684 F.2d 1066 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983).

given the defendant. In *Wright*, the defendant was apprised of his rights as follows:

> " 'Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to Court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.' "

Id. at 410 (emphasis added). In upholding the validity of the *Miranda* warning as given, the Fourth Circuit observed that:

> " 'Stripped of its cry of pain, defendant's contention is simply that he was entitled to be warned not only of *his right to counsel, but of his right to instant counsel. Miranda, however, does not require that attorneys be producible on call, or that a Miranda warning include a time table for an attorney's arrival.* Nor does it seem to us requisite that the officer conducting the *interview declare his personal and immediate power to summon an attorney.* The adequacy of the warning *is not jeopardized by the absence of such embellishments.*' "

Id. at 407 (quoting *Mayzak v. United States*, 402 F.2d 152, 155 (5th Cir. 1968)) (emphasis added).

The Eighth Circuit too has had the opportunity to evaluate the sufficiency of *Miranda* warnings similar to those given Eagan. In *Klingler v. United States*, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969), law enforcement officers read the defendant a "Standard Treasury Department *Miranda* warning" providing:

> " 'Before we ask you any questions, it is my duty to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in court, or other proceedings. You have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning. *You may have an attorney appointed by the United States Commissioner or the court to represent you if you cannot afford or otherwise obtain one.* If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting a lawyer. However, you may waive the right to advice of counsel and your right to remain silent, and you may answer questions or make a statement without consulting a lawyer if you so desire.' "

Id. at 307-08 (emphasis added). Subsequently, the officer "reiterated in his own words for the [defendant's] benefit the contents of the form:

> '[I]t means you don't have to talk to me if you don't want to, and if you do decide to talk to me, that you can stop the questioning anytime. It means that you have the right to have an attorney present with you at this time; and it means that if you do say anything, that it can be used against you later; and *that you do have the right to have an attorney appointed by the Court for you if you are later charged with a Federal offense.*' "

Id. at 308 (emphasis in original). Subsequently, the defendant contended that these *Miranda* warnings were insufficient and that his inculpatory statements made pursuant to these warnings were erroneously received in evidence. The Eighth Circuit rejected the defendant's assertions, holding:

> " 'The fact that the [officer] . . . truthfully informed [the defendant] . . . that the [officer] . . . could not

> furnish a lawyer until federal charges were proffered against him does not vitiate the sufficiency of an otherwise adequate warning. * * * *Miranda* * * * does not require that attorneys be producible on call, or that a Miranda warning include a time table for an attorney's arrival. * * * To so hold would be to allow a defendant to use his right to an attorney as a weapon against his custodians. He would simply argue if you will not furnish me an attorney now, even though I am told that I can remain silent, I will talk and after talking object to my words going into evidence. This argument is both hollow and specious.' "

Id. (quoting *Mayzak v. United States*, 402 F.2d 152, 155 (5th Cir. 1968)). Further, in *Tasby v. United States*, 451 F.2d 394, 398 (8th Cir. 1971), *cert. denied*, 405 U.S. 992 (1972), the defendant challenged as inadequate a *Miranda* warning advising him "that an attorney would be appointed 'at the proper time.' " The Eighth Circuit held: "This statement, even though a slight deviation from the *Miranda* prescription, *does not negate the over-all effectiveness of the warning.*" *Id.* at 398-99 (emphasis added).

The Tenth Circuit has also specifically rejected hypertechnical applications of *Miranda*. In *Coyote v. United States*, 380 F.2d 305, 307 (10th Cir.), *cert. denied*, 389 U.S. 992 (1967), the court summarized the defendant's assertions, noting:

> "The specific complaint here is that the mandate of *Miranda v. State of Arizona*, . . . was not observed because the clause in the written statement that '* * * I can talk to a lawyer or anyone before saying anything, and that the judge will get me a lawyer if I am broke' reflects that appellant was not informed with sufficient clarity of his right to a court appointed attorney at the time the statement was made. Thus he seems to say in effect that at most the Agent advised him only that he could talk to a lawyer before making the statement if he could afford to hire one, and that the judge would appoint a lawyer when he came to trial if he could not afford one."

The court held that the defendant "had been adequately advised of his constitutional right to the assistance of counsel," *Id.* at 309, after rejecting the defendant's purely technical and nitpicking arguments.[8] The court set forth a reasonable and appropriate standard for determining the sufficiency of a particular *Miranda* warning (the standard recently fully embraced by this court in *Richardson v. Duckworth*, 834 F.2d at 1370):

> ". . . Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. *We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used*, considering the age, background and intelligence of the individual being interrogated, *impart a clear, understandable warning of all of his rights.*"

380 F.2d at 308 (emphasis added). The Tenth Circuit further noted that "it is for the court to objectively determine whether in the circumstance of the case the words used were sufficient to convey the required warning." *Id.* Essentially the Tenth Circuit rejected a *per se* analysis

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[8] The court observed:

> "Counsel for the appellant argued in the trial court, as here, that the *wording and punctuation* of the written statement itself supports his client's understanding of the advice given to him by the Agent. Specifically he says that the comma preceding the phrase 'and the judge will get me a lawyer if I am broke' renders the sentence susceptible of the interpretation that court appointed counsel would be available only after appellant had been before the judge."

Coyote, 380 F.2d at 308 (emphasis added).

(articulated today by the majority) for evaluating the adequacy of a specific *Miranda* warning and instead objectively evaluated both the words used to convey the warning as well as the circumstances in which it was given.

More recently, the Eleventh Circuit, in *United States v. Contreras*, 667 F.2d 976 (11th Cir.), *cert. denied*, 459 U.S. 849 (1982), rejected a defendant's assertions that the *Miranda* warnings given him "failed to apprise him of his rights to have counsel appointed immediately, prior to any questioning." The defendant, Contreras, was warned by a customs officer as follows:

> " 'You have the right to consult your attorney before making any statement or answering any question, and you can have your attorney present while we interrogate you.
>
> *If you want an attorney but cannot pay for one on your own, the United States Magistrate in this city or in the Federal Court will assign you an attorney free of charge.*' "

Id. at 978 (emphasis added). Subsequently, a Drug Enforcement Administration special agent informed the defendant that:

> " 'You have the right to consult an attorney before making any statement or answering any question posed to you, and he can be present at the interrogation.
>
> *You have the right to be represented by an attorney who will be appointed by the United States federal magistrate or court in the event of insolvency on your part.*' "

Id. (emphasis added). Relying on *California v. Prysock*, 453 U.S. 35, 101 S.Ct. 2806 (1981), the court upheld the sufficiency of the warnings given Contreras, stating:

> "A *Miranda* warning need not explicitly convey to the accused his right to appointed counsel 'here and now,' and to the extent that *Lathers* and other precedents of this court require such explicit warnings, they are overruled. *Prysock*, moreover, clearly controls the case before us. *Both the customs and DEA warnings informed appellant of his right to consult with an attorney prior to questioning, to have an attorney present during questioning, and to have counsel appointed. The warnings did not condition appointment of an attorney on any future event and therefore were not deficient.*"

Id. at 979 (emphasis added).

After researching and reviewing our colleagues' decisions, it is clear that defendants' purely semantical and hyper-technical challenges to the sufficiency of a particular *Miranda* warning have been convincingly rejected by the Fifth, Second, Fourth, Eighth, Tenth and Eleventh Circuits. In particular, the *Lacy*, *Massimo*, and *Wright* courts all unequivocally held that *Miranda* warnings, identical in all relevant aspects to those given Eagan, were constitutionally sufficient. On the other hand, it appears that this circuit stands alone with its *Twomey* and *Cassell* decisions, which hold that a *Miranda* warning containing the "condemned clause" ("if and when you go to court"), is irrebuttably presumed insufficient.[9] *Twomey*, 467 F.2d at

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[9] In *Gilpin v. United States*, 415 F.2d 638 (5th Cir. 1969), a decision predating *Lacy* and relying on *Lathers*, the defendant was warned that: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, *if you go to court*." Although the court held that the warning ultimately violated *Miranda*, the court did not, as does the majority today, "condemn" the clause outright. Instead, the court evaluated the totality of the circumstances, noting:

> "Gilpin had only a sixth-grade education. He signed the waiver and made his statement the morning after he was arrested for drunkenness. Apparently his mental faculties were not functioning fully the 'morning-after,' since he confused the date of the mail robbery with the date he was in jail. Keeping in mind the Supreme Court's admonition as to the heavy burden imposed on the prosecution to show an intelligent

(Footnote continued on following page)

1252. In other words, *Twomey* and *Cassell* stand for the anachronistic and formalistic proposition that giving a *Miranda* warning which contains the "condemned clause" constitutes a *per se* violation of *Miranda*. Today, the majority rejects and disregards the great weight of authority, leaving our circuit standing alone and thus in conflict with the vast majority of other circuits, and instead resurrects *Twomey*'s "overly technical application of the *Miranda* rule." *Id.* at 1253 (Pell, J., dissenting). In so doing, the majority commits a regrettable mistake.

More importantly, the majority's decision conflicts with this circuit's decision in *United States v. Johnson*, 426 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 842 (1970).[10] In *Johnson* Judge Kiley, writing for a panel of this court, which included Senior Judge Castle and Judge Kerner, clearly rejected the defendant's nitpicking challenge to his *Miranda* warning. The court stated:

> "Harry Johnson was told that a lawyer would be appointed '*if and when you go to court*' and claims this did not fully advise him of his right to have an attorney present during the custodial interrogation. However, he signed a statement which, *read as a whole, complied with the* ***Miranda*** *requirements*. Having signed the written waiver form, without evidence to the contrary, he cannot now contend that he did not understand his rights. *See Bell v. United States*, 382 F.2d 985, 987 (9th Cir. 1969), *cert. denied*, 390 U.S. 965, 88 S.Ct. 1070, 19 L.Ed.2d 1165 (1968)."

Id. at 1115-16 (emphasis added). The court obviously evaluated the *Miranda* warning utilizing the totality of the circumstances test, and we, too, should evaluate the sufficiency of the warnings given Eagan under this test. *See Richardson v. Duckworth*, 834 F.2d at 1370. Moreover, the court specifically rejected Johnson's allegation, which is identical to Eagan's, that the *Miranda* warning given him was inadequate because he "was told that a lawyer would be appointed 'if and when you go to court.' " The *Johnson* court clearly and properly rejected the defendant's assertions. Why the majority holds to the contrary is unexplained since the majority's decision leaves our circuit with conflicting cases sending mixed signals to the trial courts of this circuit.

Further, observe that in *United States ex rel. Placek v. State of Illinois*, 546 F.2d 1298 (7th Cir. 1976), the defendant argued that his *Miranda* warnings were deficient because they failed to apprise him of his right to immediate appointment of counsel. There we held that the following *Miranda* warning was not constitutionally infirm:

> "Placek was advised that he had the right to remain silent; that anything he said could be used against him; that 'if he wanted an attorney present, he could have one': and that 'if he could not afford one, an attorney would be *appointed through the Court for him*.' "

Id. at 1300 (emphasis added). This court held that the warnings "effectively warned that [Placek] need not make any statement until he had the advice of an attorney." *Id.* Eagan was similarly warned.

In *Placek*, the defendant, as does this majority, relied on *Twomey*, but in *Placek* we distinguished *Twomey*

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[9] *continued*

> waiver of counsel, *we are compelled to say that Detective Gothard's initial warning failed to convey to Gilpin that he was entitled to the appointment of an attorney 'here and now'*. We hold therefore that the first warning failed to meet *Miranda* standards."

Id. at 641 (emphasis added). Thus, even assuming that *Gilpin* retains its validity in light of *Lacy* and the Eleventh Circuit's reasoning in *Contreras*, *Gilpin* does not support the majority's assertion that "the 'if and when' language is constitutionally defective."

[10] Significantly, the *Twomey* majority, citing to *Johnson*, conceded that "a [*Miranda*] warning including the phrase that a lawyer would be appointed for the defendant 'if and when you go to court,' ha[d] been given approval by this Court." *Twomey*, 467 F.2d at 1252-53. Further, the *Twomey* "majority opinion [did] not purport to overrule *United States v. Johnson*." *Id.* at 1253 (Pell, J., dissenting).

stating that the warnings given in *Twomey* were internally inconsistent "in that they advised the accused of the right to have an attorney present during questioning, but also indicated that an attorney could not be appointed until a later time." *Id.*[11] But isn't this the fact situation in the vast majority of *Miranda* cases since law enforcement officers neither have the power and authority, nor should they, to select and appoint counsel. The power to appoint counsel must continue to rest with the impartial judicial officer. Further, *Miranda* does not now and never did stand for the proposition that the " 'officer conducting the interview declare his personal and immediate power to summon an attorney.' " *Wright v. North Carolina*, 483 F.2d at 407 (quoting *Mayzak*, 402 F.2d at 155). I am of the opinion that we would be far better off if we ceased to lend credence to these meaningless and technical distinctions and instead consider each *Miranda* warning "read as a whole," *Johnson*, 426 F.2d at 1115, and determine whether under the circumstances the defendant understood his right to remain silent, both before and during questioning, until he consulted with a retained or appointed attorney. In other words, "a slight deviation from the *Miranda* prescription, does not negate the over-all effectiveness of the warning." *Tasby v. United States*, 451 F.2d at 398-99.

Further, the *Miranda* warnings initially given Eagan are sufficient under *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806 (1981), although the majority would like its readers to believe the contrary. In *Prysock* the following events transpired:

> "On January 30, 1978, Mrs. Donna Iris Erickson was brutally murdered. Later that evening respon-

[11] Today, the majority, echoing the technical distinction made in *Placek*, holds "The 'if and when' language is constitutionally defective because it may lead an indigent accused to believe that he is entitled to counsel *only* if and when he 'goes to court,' and not prior to police interrogation."

dent and a codefendant were apprehended for commission of the offense. Respondent was brought to a substation of the Tulane County Sheriff's Department and advised of his *Miranda* rights. He declined to talk and, since he was a minor, his parents were notified. Respondent's parents arrived and after meeting with them respondent decided to answer police questions. An officer questioned respondent, on tape, with respondent's parents present. The tape reflects that the following warnings were given prior to any questioning:

'Sgt. Byrd: . . . Mr. Randall James Prysock, earlier today I advised you of your legal rights and at that time you advised me you did not wish to talk to me, is that correct?

Randall P.: Yeh.

Sgt. Byrd: And, uh, during, at the first interview your folks were not present, they are now present. I want to go through your legal rights again with you and after each legal right I would like for you to answer whether you understand it or not . . . . Your legal rights, Mr. Prysock, is [sic] follows: Number One, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this?

Randall P.: Yeh.

Sgt. Byrd: If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: You all, uh,—if,—you have the right to have a lawyer appointed to represent you at not cost to yourself. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?

Randall P.: Yes.'

At this point, at the request of Mrs. Prysock, a conversation took place with the tape recorder turned off. According to Sgt. Byrd, Mrs. Prysock asked if respondent could still have an attorney at a later time if he gave a statement now without one. Sgt. Byrd assured Mrs. Prysock that respondent would have an attorney when he went to court and that 'he could have one at this time if he wished one.' "

Id. at 356-57, 101 S.Ct. at 2807-08. The defendant, like Eagan, contended that his *Miranda* warnings were inadequate since they failed to specifically inform him of his right to have counsel appointed prior to questioning. The Supreme Court rejected the defendant's challenges, stating "[t]his Court has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant." *Id.* at 359, 101 S.Ct. at 2809. The Court held:

> "It is clear that the police *in this case fully conveyed* to respondent his rights as required by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one. *These warnings conveyed to respondent his right to have a lawyer appointed if he could not afford one prior to and during interrogation.*"

Id. at 361, 101 S.Ct. at 2810 (emphasis added). It is apparent that the Court evaluated the sufficiency of the warning under the totality of circumstances test, thus implicitly rejecting the majority's *per se* approach.

The Supreme Court did point out, however, that a *Miranda* warning which in fact conditioned the right to appointed counsel on some future event could be held constitutionally infirm. The Court cited *United States v. Garcia*, 431 F.2d 134 (9th Cir. 1970) (per curiam), as an example. There the Ninth Circuit observed:

> "After Garcia was arrested, federal agents repeatedly questioned her. During the course of the interrogation sessions, *the agents gave her several different versions of the* ***Miranda*** *bundle of warnings. On no occasion was a warning given fully complying with* ***Miranda***. Taken together, the warnings were inconsistent. At one point she was told that she had a right to the presence of counsel 'when she answered any questions'; on another, she was told that she could 'have an attorney appointed to represent you when you first appear before the U.S. Commissioner or the Court.' "

Id. (emphasis added). In *Garcia*, because the defendant never received a complete warning at any one time the defendant's right to appointed counsel "was linked with some future point in time after the police interrogation." *Prysock*, 455 U.S. at 360, 101 S.Ct. at 2810. Similarly, in *People v. Bolinski*, 260 Cal. App. 2d 705, 723, 67 Cal. Rptr. 347, 358 (1968), the defendant, who was then in Illinois but who was to be transferred to California, was apprised that "the court would appoint [a lawyer] in Riverside County [California]." Clearly, the defendant's right to appointed counsel was conditioned on a future event.

Unlike the defendant in *Garcia*, Eagan was completely apprised of his rights when Officer Raskosky read him the warnings from the "Voluntary Appearance: Advice of Rights" form. Additionally, the petitioner was not given "*several* different versions of the *Miranda* bundle of warnings." Further, at no time was Eagan's right to appointed counsel conditioned on a future event as was the defendant in *Bolinski* who apparently believed that he would travel some 2,000 miles before counsel would be appointed. Thus, contrary to the majority's holding, Eagan's *Miranda* warnings are sufficient under *Prysock*.

Lastly, the majority's holding is incompatible with our recent decision in *Richardson v. Duckworth*. There we observed that "with respect to the formulation of the *Miranda* warning itself, the Supreme Court has . . . adopted a flexible analysis," and "has never mandated that law enforcement officers use certain 'magic words' to inform a defendant of his rights." 834 F.2d at 1370. Thus, consistent with *Prysock*, we adopted the totality of circumstances test as set forth in *Coyote v. United States*, *supra*, as "the appropriate standard to determine the sufficiency of a particular *Miranda* warning." *Richardson*, 834 F.2d at 1370.

Applying this standard to Eagan's initial *Miranda* warnings, the record conclusively establishes that Eagan was well aware of his right to have a lawyer present prior to and during interrogation. Eagan was advised that:

(1) You have the right to remain silent.

(2) Anything you say can be used against you in court.

(3) You have the *right to talk to a lawyer for advice before* we ask you any questions, and

(4) to have him with you *during questioning*.

(5) You have *this right to the advice and presence of a lawyer even if you cannot afford to hire one*.

(6) We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.

(7) *If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time.*

As an appellate reviewing court, after evaluating the totality of the information given the defendant, I would hold that Eagan was clearly informed that he had the right to talk to an attorney before the police questioned him, even if he couldn't personally afford to retain one and was specifically advised of his right to appointed counsel. *Miranda* neither requires that he be told that he has the right to appointed counsel "here and now" nor " 'require[s] that attorneys be producible on call or that a *Miranda* warning include a time table for an attorney's arrival.' " *Wright*, 483 F.2d at 407 (quoting *Mayzak*, 402 F.2d at 155). Thus, in light of the great weight of authority, and in particular the *Lacy*, *Massimo*, and *Wright* decisions, this court's earlier *Johnson* decision, the Supreme Court's *Prysock* decision, and our recent holding in *Richardson*, I would hold that Eagan's initial warning "given as a whole," survives constitutional scrutiny and is sufficient under *Miranda*. *Twomey*, 467 F.2d at 1254 (Pell, J., dissenting). I am convinced that we should reject the majority's technical application of *Miranda*, and I would overrule *Twomey* and *Cassell*.

III.

Alternatively, assuming *Twomey* and *Cassell* retain their validity and thus the petitioner's initial exculpatory statement should have been suppressed since it was made in technical violation of *Miranda*, I would affirm the district court nonetheless because the Supreme Court's recent decision in *Oregon v. Elstad*, 420 U.S. 298, 105 S.Ct. 1285 (1985), rather than the Fifth Circuit's dated holding in *Gilpin*, as urged by the petitioner, controls the admissibility of Eagan's second and incriminating confession.

There, the defendant, Gilpin, was initially arrested and charged with drunkenness, and in his *inebriated state* he blurted out that he had stolen a U.S. mail bag. The next morning the defendant "then repeated the substance of his earlier confession" pursuant to an alleged inadequate *Miranda* warning.[12] Later, the defendant was given another set of *Miranda* warnings. A few days later Gilpin was again apprised of his rights by an officer utilizing the same alleged faulty warning given originally, and again the defendant confessed.

The *Gilpin* court relied on an earlier Supreme Court decision resting on Fourth Amendment grounds which held:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first."

United States v. Bayer, 331 U.S. 532, 541-42, 68 S.Ct. 1394, 1398 (1947). Thus, relying on *Bayer*, the court in *Gilpin* observed that the defendant's initial statement made pursuant to the asserted inadequate warning led to the defendant's subsequent confession and held:

> "Here . . . Gilpin knew that 'the cat was out of the bag.' One confession led to another. The effect of the tainted confession was not dissipated by the time of the next confession. A belated adequate warning could not put the cat back in the bag."

Gilpin v. United States, 415 F.2d at 642. Here, the petitioner argues that his second incriminating statement was

[12] The defendant was warned: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if you go to court."

similarly tainted by the initial allegedly insufficient warning and thus asserts that both statements should have been suppressed. (The majority, however, asserts that "Eagan argues that his second waiver was not knowingly and intelligently given because of the misapprehension caused by the initial warning, and the failure of the second warning to correct that misapprehension.")

Even in *Bayer*, however, the Supreme Court observed that all later confessions were not necessarily tainted, stating:

> "This Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those [coercive] conditions have been removed."

United States v. Bayer, 331 U.S. at 542, 68 S.Ct. at 1398. More recently, in *Elstad*, the Supreme Court specifically rejected the reasoning of a few courts, like the *Gilpin* court, which imputed "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver, noting:

> "A handful of courts has, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made."

Oregon v. Elstad, 420 U.S. at 318, 105 S.Ct. at 1298. The Supreme Court further stated: "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver."

Id. at 312, 105 S.Ct. at 1295. In conclusion, the Supreme Court held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite[13] *Miranda* warnings." *Id.*

Thus I would determine initially whether Eagan's first statement, allegedly the result of a technical violation of *Miranda*, was nonetheless made voluntarily. Secondly, I analyze whether the second set of *Miranda* warnings was constitutionally sufficient, and lastly, my inquiry focuses on the voluntariness of the second and incriminating confession.

A. Voluntariness of Initial Statement

In *Miller v. Fenton*, 474 U.S. 104, 110, 106 S.Ct. 445, 456 (1985), the Supreme Court reaffirmed that the "ultimate issue of 'voluntariness' is a legal question" and as we recently noted "subject to plenary federal review." *Perri v. Director, Dep't of Corrections of Illinois*, 817 F.2d 448, 450 (7th Cir. 1987). Applying this standard, my review of the record convinces me that Eagan's initial statement was voluntary. The record discloses that the petitioner *initiated* the contact with the law enforcement officers on his own, calling an acquaintance of his (LoBianco) on the Chicago police department from his apartment. Subsequently, he met with LoBianco and his partner and reported that he had found the body of a nude woman and then directed and accompanied them to the scene. After leaving the scene of the crime, Eagan offered to accompany the police to the Hammond (Robertsdale) station to file a battery complaint in which he stated that he had been with the victim earlier that morning but had been attacked by the same men with whom the victim departed. Eagan went with Detectives Raskosky and Baughman to

[13] The warnings referred to in this case as the "requisite" warnings are the second set of *Miranda* warnings given to the petitioner-appellant, Eagan.

the Hammond police headquarters where he was advised of his rights. Here Eagan signed a waiver form which stated that he was "not under arrest" and was free to "leave [the] office if [he] wish[ed] to do so." Rather than leaving the station, Eagan remained and provided the officers with a statement. The record is completely barren of evidence suggesting, much less establishing, that the law enforcement officers either coerced, threatened or physically abused him. Further, the petitioner in effect concedes the issue in not claiming that his first statement was made involuntarily. I am convinced and would hold that the petitioner's initial statement, even assuming it was made in technical violation of *Miranda*, was nonetheless given freely and voluntarily.

B. Adequacy of the Second *Miranda* Warning

I am equally convinced that the second set of warnings recited to the petitioner were constitutionally sufficient. In *Richardson*, as I pointed out in Part II, this court observed that the Supreme Court "never mandated that law enforcement officers use certain 'magic words' to inform a defendant of his rights," and adopted the following standard articulated by the Tenth Circuit which foreshadowed the Supreme Court's decision in *Prysock*:

> " 'Surely *Miranda* is not a ritual of words to be recited by rote according to didactic niceties. What *Miranda* does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all his rights.' "

Richardson v. Duckworth, 834 F.2d at 1370 (quoting *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir.), *cert. de-*

nied, 389 U.S. 992 (1967)). Thus, I determine under the totality of circumstances test whether the second warning administered to Eagan constituted a "fully effective equivalent" of the four essential warnings articulated in *Miranda*.

Eagan was advised of his rights for the second time as follows:

> "1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say, may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation, I can refuse to answer any further questions, and remain silent, thereby terminating the conversation.
>
> 5. That if I cannot hire an attorney, one will be provided for me.

I do not agree with the petitioner's *initial* assertion that this warning is deficient because "[a]t no time was [he] informed of his right to have an attorney appointed prior to or during the interrogation," App. Br. at 11, since the warning, considered in its totality, makes clear that he is entitled to appointed counsel before and during questioning if he so desired. Further, the record establishes that the petitioner, a 22-year-old adult, affixed his signature in longhand to the waiver form, after reading the waiver form aloud, demonstrating the requisite intellectual ability to understand the basic and essential warnings given him. Thus, I would reject Eagan's attempt to trivialize and find fault with the recited second *Miranda* warning.

Secondly, the petitioner asserts, and the majority echoes, that the second *Miranda* warning "when viewed together with the first warnings" did not adequately inform him of his "right to have assigned counsel present at the second interrogation." App. Br. at 11. The petitioner notes that the second *Miranda* warnings "speak only of 'counsel of my own choice' and never states how or when counsel would be provided if the accused is indigent." *Id.* at 12. Eagan asserts that the respondent "failed to show that the second statement was sufficiently attenuated from the first statement." *Id.* I deem Eagan's assertions as meritless because (1) he makes only bald allegations and fails to articulate or delineate in any manner how or why the initial warning tainted the second warning; and (2) as I observed, the complete second warning clearly explains that Eagan would have been provided with appointed counsel before and during the second interrogation had he so requested. Further, as pointed out by the Supreme Court, no "purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver" where the initial statement was voluntary. *Oregon v. Elstad*, 470 U.S. at 318, 105 S.Ct. at 1298.[14] Thus, I would hold that the second set of *Miranda* warnings given Eagan were constitutionally antiseptic, and thus sufficient.

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[14] The petitioner argues that the Court's decision in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975), requires that the state has the "burden of showing attenuation," App. Br. at 12; thus, Eagan asserts that "absent a more developed record, the second statement should have been suppressed as tainted by the initial statement." *Id.* at 12-13. In *Brown* the defendant made two in-custody post-*Miranda* statements subsequent to his *unlawful* arrest. The Court held that the giving of *Miranda* warnings alone "cannot make the act [the confession] sufficiently a product of free will to break, for *Fourth Amendment purposes*, the causal connection between the illegality and the confession." 422 U.S. at 603, 95 S.Ct. at 2261 (emphasis added). Petitioner has not argued that the Fourth Amendment has been violated in this case; thus, *Elstad*, rather than *Brown*, governs under the present circumstances.

Lastly, assuming *arguendo* that *Gilpin* applied to the facts before us, my decision would be unaffected. Gilpin, unlike Eagan, actually confessed to the crime before he was given proper *Miranda* warnings. *Gilpin v. United States*, 415 F.2d at 639. Thus, the court reasoned that the defendant, regardless of whether he subsequently received an adequate *Miranda* warning, probably believed it was useless to remain silent, i.e., the defendant "could not put the cat back in the bag." *Id.* at 642. Eagan, however, never confessed to stabbing the victim until after he was given the second sufficient *Miranda* warning, thus distinguishing the present case. Officer Baughman testified, without objection, that Eagan, in his battery complaint, admitted he had been with the victim at the lakefront. The petitioner further reported that the victim willingly departed with three other men in a van and stated that these same men attacked him later. Eagan's initial challenged statement, combined with his battery complaint, both exculpatory in nature, selectively described in graphic detail the victim's alleged consensual sexual activities with him and two companions at the lakefront. It cannot even be inferred that Eagan "let the cat out of the bag" until after Detective Raskosky administered the second *Miranda* warning, at which time the petitioner confessed to the stabbing. Thus, no taint, as in *Gilpin*, can be attributed to the confession as long as it was given voluntarily. The test is simply, as the Supreme Court noted, "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Oregon v. Elstad*, 420 U.S. at 312, 105 S.Ct. at 1295. Eagan was properly warned.

C. Voluntariness of the Confession

Although the "ultimate issue of 'voluntariness' is a legal question," *Miller v. Fenton*, 474 U.S. at 110, 106 S.Ct. at 456, subject to "plenary federal review," *Perri*, 817 F.2d at 450, the findings of state courts on the subsidiary questions of whether the defendant knowingly and voluntarily

waived his *Miranda* rights are entitled to the § 2254(d)[15] presumption of correctness if the state court findings are fairly supported by the record. *See, e.g., Perri v. Director, Dep't of Corrections of Illinois*, 817 F.2d 448 (7th Cir. 1987) (holding that state court findings that a waiver of *Miranda* rights is knowing and intelligent are factual findings entitled on the § 2254(d) presumption of correctness); *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217 (7th Cir. 1987) (holding that the § 2254(d) presumption of correctness also applies to state court factual findings that a waiver of *Miranda* rights is voluntary.) "This is especially true, as in this case where the voluntariness issue focuses on the credibility of witnesses." *Richardson v. Duckworth*, 834 F.2d at 1372. Further, if fairly supported by the record, the state court's failure to "*expressly state*" that the defendant voluntarily and knowingly waived his *Miranda* rights does not render the § 2254(d) presumption inapplicable as long as the findings of a knowing and voluntary waiver are "implicit in a state court's opinion." *Bryan*, 820 F.2d at 221; *Perri*, 817 F.2d at 452.

Unfortunately, the majority completely disregards the holdings of our prior decisions in *Bryan* and *Perri* regarding the presumption of correctness to be applied to state court factual findings. Instead, the majority states "of course, we know very little about the factual circumstances surrounding these events because the state courts did not *directly* examine the issue." The majority is simply wrong.

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[15] Section 2254 provides in part:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . . ."

28 U.S.C. § 2254(d).

During the November 19, 1982, pre-trial suppression hearing, Officers Raskosky and Baughman both testified that Officer Raskosky read Eagan his *Miranda* warnings from the waiver of rights form. Raskosky next testified that at this time Eagan read the waiver form back to the officers. Raskosky "asked [Eagan] if there was any part of it that he didn't understand or [was] questionable to him," and Eagan "stated that he understood everything on the form." Tr. of November 19, 1982, Suppression Hearing, p.13. Officer Baughman also testified that Eagan understood his rights. The record further reveals that Eagan read the waiver form aloud and then signed the form.

The petitioner also took the stand at the pre-trial suppression hearing. Eagan, incredibly, testified that he didn't remember speaking with his acquaintance, Chicago Police Officer LoBianco, during the early morning hours of May 17, in spite of the fact that he [Eagan] initiated and called the police department specifically looking for LoBianco. After LoBianco responded to the call, Eagan told him an exculpatory tale of discovering a nude body at the lakefront and led him to the exact location where the victim identified him and stated: "Why did you stab me?" Continuing his charade of selective memory, the petitioner testified that he neither recollected being at the initial Hammond (Robertsdale) police station nor remembered parts of his two statements. He blamed his memory lapse on being high, drunk and suffering from withdrawals after ingesting drugs, "some Tulenols [sic],"[16] and "Canadian

[16] "Tuinal is a combination of equal parts of Seconal[R] Sodium (secobarbital sodium, Lilly) and Amytal[R] Sodium (amobarbital sodium, Lilly), barbituric acid derivatives that occur as white, odorless, bitter powders. . . . Tuinal, a moderately long-acting barbiturate, is a central-nervous-system depressant. In ordinary doses, the drug acts as a hypnotic. Its onset of action occurs in 15 to 30 minutes, and the duration of action ranges from three to 11 hours. It is detoxified in the liver."
Physicians Desk Reference, p. 1168 (41st ed. 1987).

Club" during the late evening hours of May 16, 1982. The petitioner's testimony at the suppression hearing was impeached on cross-examination after Eagan conceded that he had not ingested any drugs after contacting the police. The petitioner's testimony to the effect that he was "high and intoxicated" was also impeached by the fact that both challenged statements were clear, concise and fairly detailed. Further, Officer Raskosky, who had previously observed inebriated individuals, as well as those suffering from withdrawals, was recalled to the stand and testified that Eagan neither appeared to be intoxicated nor did he appear to be under the influence of drugs nor going through withdrawals. Eagan's testimony was more than suspect in the eyes of both the trial judge and this dissenter considering that Eagan was conscious enough to phone the police, meet them, and then lead them to the exact spot of the victim's moaning and screaming body, and in itself discredited the petitioner's testimony that he was so "high and intoxicated" that he couldn't remember.

After hearing all the pertinent testimony and observing each witness, the state trial judge who was in the best position to evaluate the witness's (Eagan's) credibility did not believe him and denied his motion to suppress. It is obvious that the state court regarded Eagan's testimony as incredible, *thus implicitly finding that the petitioner knowingly and voluntarily waived his second set of* ***Miranda*** *rights.*[17] As we recently stated, no appellate court, including this court, can or should " 'substitute its

[17] Assuming the state trial court erred when it also implicitly found that Eagan knowingly and voluntarily waived his initial *Miranda* rights because he was not intoxicated at the time, Eagan would be in no better position to argue that the first *Miranda* warning somehow tainted the second warnings because according to Eagan he couldn't "remember" much of what transpired during the evening hours of May 16, 1982, or the morning of the 17th. What one does not remember cannot give rise to "misapprehensions" or reasonably "taint" a second *Miranda* warning.

own judgment as to the credibility of witnesses' for that of the state courts." *Richardson v. Duckworth*, 834 F.2d at 1372. The majority disregards this mandate and would now remand for further factual findings. I disagree and would hold that the state court's findings are more than fairly supported by the record and therefore accord the state court's findings of fact the presumption of correctness required under § 2254(d) and further *hold that Eagan knowingly and voluntarily waived his* ***Miranda*** *rights*. Additionally, the record is barren of evidence from which one could infer, much less establish, that Eagan was coerced or induced to confess; nor has he even challenged the "voluntariness" of his confession. Thus, I would hold, after a detailed review of the record, given the totality of the circumstances, that Eagan's confession was voluntarily made and properly received in evidence at trial along with the knife and clothing the police recovered as a result of the petitioner's statement.

Lastly, assuming that Eagan's initial statement might conceivably have been made in technical violation of *Miranda* and should have been suppressed, its admission was *harmless error because (1) it essentially repeated the facts contained in his battery complaint, including that he had been with the victim that evening but that she had departed with three men in a van, which were received in evidence without objection; (2) he admitted only to having sexual relations with her and that she asked for money; he said absolutely nothing to implicate himself; and (3) after having been given the proper second* ***Miranda*** *warning, he confessed to the brutal stabbing.*

IV.

The petitioner also asserts that the trial court's instruction that voluntary intoxication was not a defense to attempted murder amounted to a denial of his due process right. The trial court instructed the jury that voluntary intoxication was not a defense to attempted murder because an Indiana statute operative at the time of Eagan's commission of the crime precluded voluntary intoxication

as a defense to attempted murder. The Indiana Supreme Court held this statute unconstitutional, *Terry v. State*, 465 N.E. 1085 (Ind. 1984), and subsequently held that the *Terry* decision was to be applied retroactively. *Pavey v. State*, 498 N.E.2d 1195 (Ind. 1986). Thus, under Indiana law, it was error for the trial court not to instruct Eagan's jury on the defense of voluntary intoxication. However, the Supreme Court of Indiana found "no reversible error" as a result of the trial court's instruction that voluntary intoxication was not a defense to attempted murder, and the petitioner has failed to present this court with any evidence or case law that persuades me that the Indiana Supreme Court incorrectly determined the error of the state trial court was harmless. As the United States Supreme Court has explained:

> "Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."

Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396, 400 (1977); *see also United States ex rel. Bonner v. DeRobertis*, 798 F.2d 1062, 1067 (7th Cir. 1986). In rejecting Eagan's claim, the Indiana Supreme Court stated:

> "Nevertheless, we find no reversible error in the court's having given the instruction. Although there was some evidence presented that the Defendant may have been intoxicated at the time he committed the crime, it was never interposed as a defense; and the record reveals that his intoxication, if existing, was not of the debilitating degree that could have raised a reasonable doubt upon the existence of the requisite *mens rea*.
>
> Defendant did not testify. The only evidence of his intoxication came from Officer LoBianco and from Defendant's sister, Katherine Roberts. . . .

Defendant gave two statements to the police. . . . In neither statement, however, did Defendant make any claim that he was intoxicated or under any disability at any time during the criminal episode.

Immediately following the criminal events, Defendant drove an automobile through the city streets some considerable distance, to the home of his sister, reported the episode to her and asked for assistance for his friend who had been cut. He had the presence of mind to heed her advice and to contact Officer LoBianco, to guide him back to the scene of the crime and to fabricate a story concerning his involvement. The only relevant evidence belied a mental state so impaired by alcohol or drugs as to preclude the existence of the *mens rea*. The issue was simply not present, hence the giving of the instruction, although error, was harmless."

Eagan v. State, 480 N.E.2d 946, 951-52 (Ind. 1985). The petitioner has not persuaded me that the Indiana Supreme Court committed error in concluding that the voluntary intoxication instruction the trial court gave constituted harmless error. Accordingly, I agree with the district court and hold that the petitioner's claim of a constitutional violation based on the voluntary intoxication instruction the state trial court gave was without merit.

V.

For the aforementioned reasons, I respectfully disagree and dissent from the majority's decision and would affirm the order of the district court denying Eagan's petition for a writ of habeas corpus.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—3-22-88—475

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GARY JAMES EAGAN

Petitioner

v. No. S 86-56

JACK R. DUCKWORTH,
Superintendent

MEMORANDUM AND ORDER

The petition in this case was filed on February 3, 1986 seeking relief under 28 U.S.C. § 2254. The petitioner Gary James Eagan is now an inmate at the Indiana State Prison at Michigan City, Indiana and was convicted on December 7, 1982 of attempted murder in the Superior Court of Lake County at Crown Point, Indiana. The state court file has been filed and examined pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293 (1963).

The mandates of *Lewis v. Faulkner*, 689 F. 2d 100 (7th Cir. 1982) have been met.

A direct appeal was taken to the Supreme Court of Indiana which affirmed the conviction in an opinion by Justice Prentice reported at 480 N.E. 2d 946 (1985). This court has carefully read the majority opinion of Justice Prentice and the dissenting opinion of Justice DeBruler, the latter being reported at 480 N.E. 2d page 952. The findings in the majority opinion are subject to the presumptions of correctness found in *Sumner v. Mata*, 449 U.S. 539 (1981).

The issues raised in the petition are two, but the same appear to be interrelated. The first one is a general assertion which encompasses a more specific one. The first assertion is that the fact finding procedure employed by the Supreme

Court of Indiana was not adequate to afford a full and fair hearing and that such a full and fair hearing was not received. The second issue raised has to do with the admission of the confession of Gary James Eagan in the Indiana trial court. It does appear that these issues have been fully exhausted as required by *Rose v. Lundy*, 455 U.S. 509 (1982) and *Duckworth v. Serrano*, 454 U.S. 1 (1981). The issue that must therefore be the center of our focus is the one related to the voluntariness of a confession. He also raises some issue with regard to the appointment of a Judge Pro Tem which need not detain us long.

Since the issue here is one of involving a voluntary confession, invoking the Fifth Amendment Under *Miranda v. Arizona*, 384 U.S. 436 (1966), this court is not entitled to deal with the issue under *Stone v. Powell*, 428 U.S. 465 (1976). The latter case has not been applied to Fifth Amendment issues to the satisfaction of this court. So the record here will be carefully and fully examined to the issue of admitting this confession, *see White v. Finkbeiner*, 687 F. 2d 885, 889 (7th Cir. 1982), *remanded*, 104 S. Ct. 1433 (1984) for reconsideration under *Solem v. Stumes*, 104 S. Ct. 1338 (1984). Footnote 15 in *White v. Finkbeiner*, 687 F. 2d 885 refers to the opinion of Justice Powell in *Brewer v. Williams*, 430 U.S. 387, 414 (1977), which leaves open the possible application of *Stone v. Powell* to Fifth and Sixth Amendment issues. For present purposes that issue remains to be solved by the Supreme Court or this Circuit.

Also the factual record must be here examined as far as sufficiency is concerned under the standards of *Jackson v. Virginia*, 443 U.S. 307 (1979). Under the same the record is sufficient.

The fundamental issue in this record is the voluntariness of confession and candor requires this court to admit that it is a close one as is well illustrated by the dissenting opinion of Justice DeBruler. From the record it appears that the petitioner was questioned on two occasions following the incident for which he was arrested. The first statement was made on the morning of the alleged crime prior to his arrest. Prior to being questioned petitioner was advised of his rights to read and sign

a waiver of rights form which explained those rights. The petitioner allegedly read and signed the form prior to making his statement. Petitioner was again questioned by the police on the next day. The statement made on this second occasion is the confession complained of which was admitted in the course of the trial.

The record in this case is very sparse in regard to that pretrial hearing and the results thereof. It is correct that under the law of Indiana the requirements for findings as a result of such a hearing are not so rigid as they are under the Federal Rules of Criminal Procedure for criminal trials in a United States District Court. It has never been the intent or desire of this court to impose the full-blown federal system on state court judges except to the extent that the Constitution of the United States mandates it. An examination of the state transcript discloses that the pretrial motion to suppress was filed on October 21, 1982 and was set for hearing on November 19, 1982 at 8:30 o'clock A.M. The court proceedings on November 19, 1982 indicate that the State of Indiana by its deputy prosecuting attorney, the defendant, Gary James Eagan, in person and by his counsel, were in open court and the matter was submitted on Eagan's motion to suppress written statements. The record then recites: "Evidence is heard and arguments had and the court being duly advised, now denies motions to suppress."

That record may be adequate, if only barely so under the prevailing law in the State of Indiana. If that is the only record present there would be a serious deficiency but it is not all that is present. There is an extensive trial record that relates directly to the question of voluntariness which issue was carefully and in this court's view correctly considered and decided by Justice Prentice in his issue I at 480 N.E. 2d at page 948. The petitioner has cited *Emler v. Duckworth*, 549 F. Supp. 379 (N.D. Ind. 1982) from this court and the reasoning and result there are consistent with the reasoning and result here.

The record here does not reflect an arguable violation of *Edwards v. Arizona*, 451 U.S. 477 (1981) even though this trial was after the effective date of that opinion and is not affected by

the decision in *Solem v. Stumes*, ____ *U.S.* ____, *104 S. Ct. 1338 (1984). See also, White v. Finkbeiner*, 753 F. 2d 540 (7th Cir. 1985). For the application of *Edwards* to direct appeals, see *Shea v. Louisiana*, ____ U.S. ____, 105 S. Ct. 1065 (1985).

The testimony of Detective Sergeant Thomas Baughman beginning at 225 (Tr.) bears directly on the issue of voluntary confession and clearly manifests adherence to *Miranda v. Arizona*, 384 U.S. 436 (1966), especially as to the so-called second statement.

The issue raised with regard to instructions present no error of constitutional dimension that must be considered here. This court is well familiar with *United States v. Hillsman*, 522 F. 2d 454 (7th Cir. 1975) and there was no violation of those concepts here.

On the subject of instructions, Court's Instruction 13 at Tr. p. 68 dealt specifically with the subject of voluntariness.

The petitioner also makes some attempt to question the procedures with regard to the appointment of Judge Pro Tem to take the verdict because of the necessary absence of the state trial judge to attend a funeral of a family member. The court has carefully examined the transcript of how the state trial judge handled that procedure and he handled it very appropriately and delicately. This court is well aware of the sensitivity with which trial judges must approach the processes of jury deliberation. For example, see *U.S. v. Chaney*, 559 F. 2d 1094 (7th Cir. 1977).

In this case there is nothing in the record to indicate any of the kinds of alleged coercive conduct that were suggested in the *Chaney* case. As a simple matter of state law the factual context of *Bailey v. State*, 397 N.E. 2d 1024 (Ind. App. 1979) is not applicable to the situation in this case where the judge was appointed merely to receive a verdict.

For all the foregoing reasons, the petition for writ under 28 U.S.C. § 2254 is now DENIED. IT IS SO ORDERED. Enter June 24, 1986.

ALLEN SHARP
Chief Judge
United States District Court

(Rev. 5)
(Other Edition)

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT: NORTHERN DISTRICT OF INDIANA
CASE TITLE: GARY JAMES EAGAN v. JACK DUCKWORTH, Supt.	DOCKET NUMBER: SOUTH BEND, INDIANA S 86 - 56
	NAME OF JUDGE OR MAGISTRATE: ROBERT L. MILLER, JR

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (individual) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that for reasons set forth in Memorandum and Order entered herein

Petition for Writ of Habeas Corpus is DENIED.

CLERK: Richard E. Timmons	DATE: 6/27/86
(BY) DEPUTY CLERK: Eleanor J. Engstrom	

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GARY JAMES EAGAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CAUSE NO. S 86-00056
	)	
JACK R. DUCKWORTH, Warden,	)	
	)	
Respondent.	)	

RETURN TO ORDER TO SHOW CAUSE

Comes now the Respondent, by counsel, Linley E. Pearson, Attorney General of Indiana, by Michael A. Schoening, Deputy Attorney General of Indiana, and in response to the Order to Show Cause entered herein on February 3, 1986, would show the Court that relief should be denied for the following reasons.

1. Petitioner Gary James Eagan, has exhausted his available state remedies on the issues raised herein as they were presented to the Supreme Court of Indiana.

2. Petitioner, Gary James Eagan, was afforded a full, fair and adequate hearing, on the issues raised, by the Indiana Supreme Court and their findings as to these issues are entitled to a presumption of correctness.

3. Petitioner was fully advised of his constitutional rights prior to entering a voluntary confession when questioned by the police.

4. Petitioner suffered no deprivation of due process by the procedures followed by the trial court of his conviction.

A memorandum in support of this return is attached hereto and incorporated herein by reference.

Petitioner is hereby notified pursuant to *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982), that 28 U.S.C. §2248 provides that the allegations of a return to order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted by the Court as true, except to the extent that the Court finds from the evidence that they are not true. The local Rules of this Court provide that you have fifteen (15) days from the date of service (the date on the certificate of service found at the end of the attached memorandum in support) within which to file a response (plus three (3) days if this return and memorandum are served by mail). Failure to file a response within the time provided by these rules may subject this case to summary ruling by the Court; that is, the Court may decide this case without your response or traverse. Upon your written request, the Court may allow you more time to respond.

WHEREFORE, Respondent respectfully prays the Court deny any and all relief sought by Petitioner and for all other necessary and proper relief in the premises.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ Michael A. Schoening
Michael A. Schoening
Deputy Attorney General

MEMORANDUM IN SUPPORT

This case comes before the Court on petition of Gary James Eagan for Writ of Habeas Corpus. Petitioner is presently incarcerated at the Indiana State Prison, Michigan City, Indiana. Petitioner was convicted of attempted murder in the Lake Superior Court, and was sentenced, to thirty-five (35) years imprisonment, on December 7, 1982.

A direct appeal was taken to the Indiana Supreme Court which affirmed his conviction. The Supreme Court's opinion is reported at 480 N.E.2d 946 (1985), a copy of which is attached to

the original of this return. Petitioner states in answer to question ten (10) of the petition that the only other action taken in this matter was a motion for transcripts and record, still pending before the Lake Superior Court. The Attorney General is otherwise unaware of any collateral attack against Petitioner's conviction. The trial transcript, as well as the appellate briefs filed before the Indiana Supreme Court, are submitted with this return.

The following issues are raised and discussed in Eagan's petition for Writ of Habeas Corpus:

1. Whether the findings of the Indiana Supreme Court are entitled to a presumption of correctness;

2. Whether Petitioner was inadequately advised of his constitutional rights prior to making his statements to the police thereby rendering his confession and evidence obtained therefrom inadmissible;

3. Whether the trial court deprived Petitioner of due process by;

a) failing to instruct the jury as to the offense of attempted voluntary manslaughter;

b) instructing the jury that voluntary intoxication was not a defense to the crime of attempted murder; and

c) appointing a judge pro tempore to accept the jury verdict in the judge's absence.

Factual Findings of the Supreme Court of Indiana are entitled to a Presumption of Correctness.

Petitioner claims that he did not receive a full, fair and adequate evidentiary hearing in his appeal before the Supreme Court of Indiana. For this reason the findings of the Supreme Court are not entitled to a presumption of correctness. Petitioner bases his allegation that he was deprived of a fair hearing upon the Supreme Court's stated standard of review to be applied in such cases.

The Appellate and Supreme Courts of Indiana have on numerous occasions set out the standard of review to be applied to appeals from criminal conviction. The evidence is viewed in a light most favorable to the State. Evidence is not reweighed and credibility of witnesses is not rejudged. Where there is ample evidence to support the verdict it will be affirmed. *Battle v. State*, Ind., 415 N.E.2d 39 (1981); *Ward v. State*, Ind. App., 408 N.E.2d 140 (1980).

Several Federal Courts have addressed this issue and decided against Petitioner's position. The Seventh Circuit Court of Appeals stated that it is not a function of the federal courts to second guess the findings of fact made by the state courts. In addressing this question the Court of Appeals held that federal courts must defer to the findings of fact made by a State Supreme Court unless they are not fairly supported by the record. *Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976). The findings made by the Supreme Court of Indiana in this case are more than adequately supported by the record and therefore entitled to a presumption of correctness.

Voluntariness of Confession

The first substantive issue raised by Petitioner addresses the voluntariness of the statements he gave the police. According to Petitioner he was misinformed regarding his right to an attorney at the time of questioning and his statements made at that time were not made voluntarily. Consequently those statements and evidence obtained thereby is inadmissible in court. Petitioners assertions are not supported by the record.

A confession must be made of one's own free will and rational intellect not as a product of an overborne will. *Columbe v. Connecticutt*, 367 U.S. 568 (1961). To determine whether a confession was entered into voluntarily the Court should review the circumstances surrounding the confession. *Reck v. Pate*, 367 U.S. 433 (1961)

In this case Petitioner presents two bases for his contention that his confession was involuntary. First, he alleges that when

he was advised he could have an attorney appointed that right was tied to some future point in time as proscribed by *California v. Prysock*, 453 U.S. 36 (1981). Further, Petitioner argues he was unable to enter into a confession of his own free will as his will was impaired due to his having consumed drugs and alcohol prior to making his statement.

Prysock does prohibit the use of a confession where the right to an attorney has been tied to some future point in time. However, as in *Prysock*, the right to an attorney, as communicated in this case, was *not* tied to a future point in time. Consequently, this is not a basis for finding the confession constitutionally invalid and thus inadmissible.

Petitioner made statements to the police on two occasions following the incident for which he was arrested and consequently convicted. The first statement was made on the morning of the crime prior to Petitioner's arrest. Prior to being questioned Petitioner was advised of his rights, and asked to read and sign a waiver of rights form which explained those rights in clear and concise language as set out below.

VOLUNTARY APPEARANCE: ADVICE OF RIGHTS
YOUR RIGHTS

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. *You also have the right to stop answering at any time until you talk to a lawyer.* (emphasis added)

The italic portions of the waiver of rights form set out above clearly indicate that Petitioner's right to an attorney was not

linked to any future point in time. The Petitioner read and signed the form prior to making his statement.

Petitioner was again questioned by the police the next day. The statement made on this occasion is the confession complained of. As before, Petitioner was advised of his rights and asked to read and sign a waiver of rights form prior to being questioned. That form advised:

> 1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> 2. *That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.*
>
> 3. *That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.*
>
> 4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.
>
> 5. That if I cannot hire an attorney, one will be provided for me.
>
> [emphasis added]

As before, the underlined portions of the form read and signed by Petitioner clearly repudiate the position taken by him in this action. See, *U.S. ex rel. Cooper v. Warden, Il. State Penitentiary, Pontiac Branch*, 566 F.2d 28 (7th Cir. 1977).

As to Petitioner's argument that he was unable to exercise his free will because it was impaired due to the use of drugs and alcohol, that likewise is unsupported by the record. It is true that there is much evidence of Petitioner being under the influence at the time of the incident. He may have been recovering from the ill effects of such consumption at the time of his first statement. However, there is no evidence of his being

under the influence of drugs and/or alcohol at the time of his second statement, the actual confession, given one day later.

Similar circumstances were addressed by the Seventh Circuit Court of Appeals in *U.S. ex rel. Hayward v. Johnson*, 508 F.2d 322, (7th Cir. 1975). In Hayward the defendant was a drug addict and was suffering from withdrawal at the time of his questioning. At the point where the defendant became ill and asked to stop the police would stop their questioning and have the defendant cared for. Questioning would not resume that day. The questioning of the defendant took place on three occasions over the span of several days. The confession was obtained on the third session. The Court of Appeals expressed its belief that a confession obtained in this manner was not done in an intimidating fashion and the fact that it was given on the third occasion of questioning indicates he understood what he was doing as he had been questioned and released before. Such is the case with Petitioner's confession.

In order to obtain relief in a petition for habeas corpus the petitioner must present "convincing evidence" in order to persuade a federal court to disregard a state court's determination of disputed facts. *Jones v. Swenson*, 469 F.2d 535, (5th Cir. 1972). Petitioner has not carried his burden.

DUE PROCESS

Petitioner next alleges that he was deprived of a fair and adequate trial on the crimes charged against him. According to Petitioner the trial court erred in failing to instruct the jury on the possibility of finding him guilty of attempted voluntary manslaughter rather than murder. Petitioner also contends the trial court erred in instructing the jury that voluntary intoxication would not serve as a defense to attempted murder. Finally, Petitioner argues the trial court erred in appointing a judge pro tempore to accept the jury's verdict.

As to Petitioner's contention the trial court erred in failing to instruct the jury regarding attempted voluntary manslaughter, no instruction on this issue was ever tendered to the

court by Petitioner. Failure to tender proper jury instructions waives any error arising by the Court's failure to read such an instruction. *U.S. v. Wilkinson*, 754 F.2d 1427 (2d Cir. 1985) *cert. denied* 105 S.Ct. 3482; *Thomas v. State*, Ind., 443 N.E.2d 1197 (1983).

As to Petitioner's argument regarding the jury instruction relative to voluntary intoxication it should be noted this is a limited defense. Consequently, instructions relating to voluntary intoxication as a defense are limited in scope. Petitioner objected to the jury instruction as read by the court on the grounds that it was an incorrect statement of law. However, IC 35-41-3-5 which sets out the defense of intoxication was amended two years prior to Petitioner's trial and the trial court's instruction is consistent with that law. Further, Petitioner is entitled to instruction on intoxication only if sufficient evidence exists on the issue so that a reasonable man could possibly entertain a doubt that defendant was able to form the necessary intent. *Womack v. U.S.*, 336 F.2d 959, (D.C. Cir. 1964); *Morrison v. Duckworth*, 550 F.Supp. 533, (D.C. In. 1982).

The last issue raised by Petitioner addressed the trial court's appointment of a judge pro tempore. Toward the end of Petitioner's trial it became necessary for the judge to appoint a judge pro tempore. All discussions of this were held before counsel and outside the presence of the jury. The judge pro tempore was appointed but did not take the bench until after the jury had retired to deliberate. The original judge presided over closing arguments and determined which exhibits could be examined by the jury if requested, prior to his leaving. Consequently, the act of appointing a judge pro tempore did not rush the jury into reaching a verdict against Petitioner as he contends.

Substitution of a judge after a jury has begun deliberation, while frowned upon, is not harmful error. *U.S. v. Santos*, 588 F.2d 1300 (9th Cir. 1979); *U.S. v. Boswell*, 565 F.2d 1338 (5th Cir. 1978).

CONCLUSION

For the reasons stated above, Respondents respectfully urge the Court to deny the issuance of a writ of habeas corpus and dismiss the above-captioned cause and for any and all relief just and proper in the premises.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ Michael A. Schoening
Michael A. Schoening
Deputy Attorney General

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Return to Order to Show Cause has been duly served upon the following person by United States Mail, first-class, postage prepaid, on this 5th day of March, 1986:

Mr. Gary James Eagan
DOC #26325
P.O. Box 41
Michigan City, Indiana 46360

/s/ Michael A. Schoening
Michael A. Schoening
Deputy Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6332
jeg:6157s

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District NORTHERN DISTRICT OF INDIANA
Name GARY JAMES EAGAN	Prisoner No. 26378 S85-00056
Place of Confinement: Indiana State Prison, Michigan City, Indiana 46360	
Name of Petitioner (include name under which convicted) GARY JAMES EAGAN	Name of Respondent (authorized person having custody of petitioner) V. JACK R. DUCKWORTH, Warden
The Attorney General of the State of Indiana, Honorable Linley Pearson, Room 219, State House, Indianapolis, In 46204	

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Superior Court of Lake County, Crown Point, Indiana

2. Date of judgment of conviction: December 7, 1982

3. Length of sentence: Thirty-Five (35) years

4. Nature of offense involved (all counts): Attempted Murder (; and Innocent of Count I Rape.)

5. What was your plea? (Check one)
(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)
(a) Jury ☒
(b) Judge only ☐

7. Did you testify at the trial?
Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
Yes ☒ No ☐

FILED
FEB 3 1985
RICHARD E. TURNER
U.S. DISTRICT COURT

9. If you did appeal, answer the following:
(a) Name of court: Indiana Supreme Court
(b) Result: Affirmed 480 N.E. 2d 916 (Ind 1985)
(c) Date of result: August 2, 1985
(d) Grounds raised: All grounds presented in this Petition for Habeas Corpus were presented to the Indiana Supreme Court on direct appeal.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:
(a) (1) Name of court: Lake County Superior Court
(2) Nature of proceeding: Motions for Transcripts and Records
(3) Grounds raised: Motions for Transcripts and Records
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒
(5) Result: Still Pending
(6) Date of result:
(b) As to any second petition, application or motion give the same information:
(1) Name of court: NONE
(2) Nature of proceeding:

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:
(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies on each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should *raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: The requirement that Petitioner exhaust state remedies prior to applying to this Court for Habeas Corpus have been satisfied. (See Attached)

Supporting FACTS (tell your story *briefly* without citing cases or law): See attached "Facts in Support of Ground One".

B. Ground two: Facts found by the Indiana Supreme Court are erroneous and do not enjoy a presumption of correctness pursuant to 28 U.S.C. 2254 (d). (See Attached)

Supporting FACTS (tell your story *briefly* without citing cases or law): See attached "Facts in Support of Ground Two".

C Ground three: Petitioner was denied the right to the privilege against self incrimination as guarenteed by the fifth and fourteenth amendments. (See attached)

Supporting FACTS (tell your story *briefly* without citing cases or law): See attached "Facts in Support of Ground Three".

D Ground four: Petitioner was denied due process of law, contrary to the fourteenth amendment to the United States Constitution.

Supporting FACTS (tell your story *briefly* without citing cases or law): See attached Facts in Support of Ground Four".

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: All grounds presented to the Indiana Supreme Court on direct appeal.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing: Mr. David Schneider, Esq., Crown Point, Indiana

(b) At arraignment and plea: Same as 15 (a)

(c) At trial: Same as 15 (a).

(d) At sentencing: Same as 15 (a)

(e) On appeal: Mr. Dennis Stanton, Esq., Crown Point, Indiana

(f) In any post-conviction proceeding: None

(g) On appeal from any adverse ruling in a post-conviction proceeding: None

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be served in the future: NA

(b) Give date and length of the above sentence: NA

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on
JAN. 24, 1986
(date)

Gary L. Eaton
Signature of Petitioner

GROUND ONE

THE REQUIREMENT THAT PETITIONER EXHAUST STATE REMEDIES PRIOR TO APPLYING TO THIS COURT FOR HABEAS CORPUS HAVE BEEN SATISFIED IN THIS PARTICULAR CASE.

FACTS WHICH SUPPORT GROUND ONE

1. All issues presented in this petition for habeas corpus were presented on direct appeal of petitioner's conviction to the Indiana Supreme Court and decided adversely in *Eagan v. State*, 480 N.E. 2d 946 (Ind 1985).

2. Issues decided on direct appeal in Indiana may not be relitigated in post-conviction proceedings. *Layton v. State*, 307 N.E. 2d 477 (1977); *Frasier v. State*, 366 N.E. 2d 1166 (1977); *Elician v. State*, 380 N.E. 2d 548 (1978).

3. Presenting a petition for post-conviction relief to the courts of Indiana on issues presented in this petition for habeas corpus, where those issues have already been decided adversely to petitioner on direct appeal of his conviction would be an exercise in futility. *United States Ex Rel: Tonaldi v. Elrod*, 716 F. 2d 431 (7th Cir. 1983).

GROUND TWO

FACTS FOUND BY THE INDIANA SUPREME COURT ARE ERRONEOUS, AND DO NOT ENJOY A PRESUMPTION OF CORRECTNESS PURSUANT TO 28 U.S.C. 2254 (d), WHERE:

a). The fact finding procedure employed by the Indiana Supreme Court was not adequate to afford a full and fair hearing; and:

b). Petitioner did not receive a full, fair and adequate hearing in the Indiana Supreme Court.

FACTS WHICH SUPPORT GROUND TWO

The Indiana Supreme Court found:

1. "Before a confession may be admitted into evidence, the state must establish beyond a reasonable doubt that the suspect intelligently and knowingly waived his rights not to incriminate himself and to have an attorney present". 480 N.E. 2d at 948, 949.

2. "However, this court will not reweigh the evidence in evaluating a trial court's decision to admit a confession, but will only determine whether the record includes sufficient evidence to sustain the trial court's ruling that the confession was voluntarily made".

3. "The record contains no indication that (petitioner) questioned the officers or expressed any confusion concerning the contents of these advisements, nor any indication that (petitioner) requested an attorney before or during his statement". 480 N.E.2d at 949.

4. Petitioner alleges upon information and belief that the Indiana Supreme Court did not have a full and complete transcript of record before it when rendering a decision in this case, despite the Court Reporter's certificate that the record was in fact complete.

5. Petitioner presently has a copy of the transcript of Evidence, which bears official certification of the Court Reporter. Missing from that transcript in petitioner's possession, is the Transcript of the Motion to Suppress hearing, and the Trial Court's ruling on the voluntariness of the confession.

6. Indiana Appellate Rule 7.2 (1)(2) required the Court Reporter to certify "all papers filed or offered to be filed with the Clerk of the Trial Court during the course of the action, and a copy of the order book entries."

7. Indiana Appellate Rule 7.2(3) required the Court Reporter to certify "The transcript of evidence and proceedings at trial".

8. Petitioner did not receive a full and fair hearing in the Indiana Supreme Court, because that court failed to consider petitioner's severe drug intoxication at the time of the statements, and did not evaluate the statements on *"the totality of circumstances"*.

9. The Court's finding that petitioner made no request for counsel would be erroneous in light of the police officer's telling petitioner that even if he could not afford counsel, and did request counsel, no lawyer could be provided until he went to Court and the Court appointed a lawyer.

10. The finding of the Indiana Supreme Court that *California v. Prysock*, 453 U.S. 355, 101 S Ct 2806, 69 L Ed 2d 696 (1981) did not support petitioner's contentions is erroneous, in light the holding of *Prysock*, that:

> "Other courts considering the precise question presented by this case — whether a criminal defendant was adequately informed of his right to the presence of appointed counsel prior to and during interrogation — have not required a verbatim recitation of the words of the Miranda opinion but rather have examined the warnings given to determine if the reference to the right to appointed counsel was linked to some future point in time after the police interrogation".

11. The Prysock Court then setforth three (3) cases in which a criminal suspects right to appointed counsel was linked to some future time after the police interrogation and the *Prysock* Court stated:

"In both instances the reference to appointed counsel was linked to a future point in time, after police interrogation, and therefore did not fully advise the suspect of his right to appointed counsel before such interrogation". 101 S Ct at 2810.

12. The Finding of the Indiana Supreme Court, that "(Petitioner) was fully advised of his rights to counsel before his second, substantially inculpatory statement was given to police, and it was properly admitted" is erroneous.

13. The second advisement setforth that "If I cannot hire an attorney, one will be provided me".

14. The second advisement was drawn so as to be uncertain on the question of time, in that, it did not inform petitioner of his right to the presence of counsel before the interrogation.

15. The uncertainty is supplied with additional wrong meaning, by the advisement given petitioner on the same subject shortly before, which clearly and unmistakably said that free lawyers may be had at some future point in time, *"If and when you go to court"*.

16. The above circumstances do not setforth that petitioner was *"fully advised"* of the right to have counsel present *"prior to interrogation"*.

GROUND THREE

PETITIONER WAS DENIED THE RIGHT TO THE PRIVILEGE AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, IN THE FOLLOWING PARTICULARS:

a). Where prior to obtaining a first confession from petitioner, police officers linked petitioner's right to counsel to some future time, in violation of *California v. Prysock*, 453 U.S. 355, 101 S Ct 2806, 69 L Ed 2d 696 (1981);

b). Where the second advisement of *Miranda* rights were inadequate because they were drawn so as to be uncertain on the question of time, in that the advisement did not inform petitioner of the right to Counsel *now*;

c). Where Evidence recovered and introduced at trial, which flowed from the confessions, was "Fruit of the Poisonous Tree", and should have been excluded, and:

d). Where introduction of the confessions cannot be considered harmless error, because it cannot be said beyond a reasonable doubt that the error did not contribute to the verdict.

FACTS WHICH SUPPORT GROUND THREE

1. Petitioner was charged with the crimes of Rape (IC 35-42-4-1) and Attempted Murder (IC 35-42-1-1).

2. Following a trial by jury, petitioner was acquitted of Rape, and found guilty of attempted murder, and sentenced to thirty-five (35) years imprisonment.

3. Kay Sandra Williams testified she was waiting for a bus at 127th Street in Chicago when two men approached in a car and offered her a ride. They met up with another car containing about fifteen men and drove to a wooded area by Lake Michigan where she was forced to have sex (or agreed to have sex for money, R. 251-251) with all of them.

3. As they were leaving, they ran into two more friends and four of them drove back to the woods with the woman. (R. 115-116). The second time around, four men were involved in having sex with the woman. (R. 117-156).

4. When they finished having sex, an argument ensued over the money, and the woman was hit in the head with a brick, and stabbed with a knife. Ms Williams rolled onto her stomach to avoid the blows, and she was stabbed a number of times.

5. In the early morning hours of May 17, 1982, Joseph LoBianco, a Chicago Police Officer received a call from petitioner stating that petitioner had found a dead woman.

6. Officer LoBianco testified that when he met petitioner, petitioner was "high" but that he could not tell what it was from, that his eyes were kind of reddish. He was very hyper, unsure of himself".

7. Petitioner took officer LoBianco out to the scene where they found Ms Williams. She was still conscious and looked at petitioner, and asked why he (petitioner) had stabbed her. (R. 201-208).

8. Ms Williams was taken to a Chicago Hospital and petitioner remained at the scene with two other Chicago Detectives. (R. 209-210, 226).

9. Detectives Baughman and Raskowsky of the Hammond Police Department went to the scene at 8.00 on the morning of May 17, 1982, took photographs and collected evidence.

10. Petitioner went to the Robertsdale Police Station to make out a Report concerning how he (petitioner) had been attacked by three men who went off with the girl.

11. At the Hammond Police Station, prior to giving a statement, Officers Baughman and Raskowsky read petitioner the following *Miranda* rights:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer." (Emphasis added).

12. Petitioner then gave the officers a statement, which is incorporated as though fully setforth herein, and is appended hereto as petitioner's exhibit "1".

13. Petitioner was held in the basement lockup unit of the police station. (R. 262).

14. The next day, Officers Baughman and Raskosky talked to the victim and Officer LoBianco. As a result of new information, they took another statement from petitioner at 4.21 p.m. on May 18, 1982, in which petitioner admitted he stabbed Ms Williams. (R. 243, 244, 247).

15. Prior to giving the second statement, the police read petitioner rights under *Miranda*. Those admonitions are incorporated as though fully setforth herein, and are appended as

petitioner's exhibit "2" in the appendix. The relevant portion of the *Miranda* rights, relevant to this petition for habeas corpus are:

> "5. *That if I cannot hire an attorney, one will be provided for me*". (Emphasis added).

16. The following morning petitioner took police to the Lakefront where Divers recovered a knife, a sheath, and a bloody towel. (R. 255-256).

17. Prior to trial Counsel filed a Motion to Supress petitioner's statements given to the Hammond Police. Because petitioner has been unsuccessful in obtaining from the Lake Superior Court records pertinent to this case, Petitioner alleges upon information and belief that the Motion sought to have statements suppressed at trial because of invalid *Miranda* warnings, and because petitioner's right to counsel prior to questioning, was linked to some future time, contrary to *California v. Prysock*, Supra.

18. Subsequent to a pre-trial suppression hearing, held out of the presence of the jury, the court over-ruled the Motion to Suppress, and the statements were admitted at trial, over the objection of petitioner.

19. Petitioner alleges upon information and belief, that the trial court's ruling upon the voluntariness of the confessions, did not conform to the requirements of *Sims v. Georgia*, 385 U.S. 538, 544 (1967), in that the determination of the voluntariness of the statements was not unmistakingly clear on the record.

20. Petitioner further alleges upon information and belief that the state failed to prove beyond a reasonable doubt that petitioner "*knowingly and intelligently*" waived the right to have counsel present prior to giving statements to the Hammond Police Department.

21. Petitioner deposes that at the time the statements were given to the Hammond Police Department, Petitioner was addicted to the drugs "*Tuenol*" and "*Seconal*".

22. Petitioner further deposes that in addition to the drug addiction as setforth in paragraph twenty-one above, Petitioner had been drinking Canadian Club Whiskey for approximately twenty-four hours prior to arrest, and approximately twelve hours prior to the statement first given to the Hammond Police.

23. Petitioner alleges that the drugs Tuenol and Seconal, and the mixture of alcohol substantially impaired petitioner free and rational choice, and caused petitioner's mind to be a state of "mania", and as such produced an involuntary statement.

24. Prior to obtaining the second statement from petitioner, police informed petitioner that "*if (he) could not afford an attorney, one would be provided for me*".

25. On the "totality of circumstances", the second *Miranda* warnings were inadequate because they did not inform petitioner of his immediate right to counsel.

26. Petitioner was under extreme drug addiction, along with an alcohol mixture, and had already been advised "*we have no way of giving you an attorney, but one will be appointed for you, if you wish, if and when you go to court*".

27. Petitioner deposes that at the time police officers read petitioner the *Miranda* rights, and at the time petitioner was under severe drug intoxication, petitioner was unable to rationally and free determine such rights, and further was unable to understand the ramifications of signing such a waiver.

28. Following the giving of the two statements as setforth herein, Petitioner took police to the lake front where Evidence was recovered. (R. 255-256).

29. On the "*totality of circumstances,*" and the facts of this particular case, that evidence was the fruit of a poisonous tree, and when admitted at trial over petitioner's objection, incriminated petitioner.

30. In order for evidence to be ruled harmless error, it must be said beyond a reasonable doubt that the error did not contribute to the verdict.

31. On the "totality of circumstances" as setforth herein, the two statements could not be considered harmless error when admitted at trial, nor could the evidence which flowed from the confessions be considered harmless error.

GROUND FOUR

PETITIONER WAS DENIED DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THE FOLLOWING PARTICULARS:

a). Where an erroneous and unconstitutional jury charge so infected the entire trial;

b). Where the trial court failed to instruct the jury on *all* the law of the case; and

c). Where, after the jury was sworn, and all Evidence received, the Trial Judge turned the case over to a Judge *Pro-Tempore*, in order that the Trial Judge Could attend a funeral.

FACTS WHICH SUPPORT GROUND FOUR

1. At the conclusion of trial, the Court gave the jury an instruction concerning Voluntary Intoxication, which contained the following:

> "It is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, if the intoxication resulted from the introduction of a substance into his body without his consent or when he did not know that the substance might cause intoxication."
>
> "Voluntary intoxication is a defense only to the extent that it negates an element of the offense referred to by the phrase 'with an intent to' or with 'an intention to' ".
>
> *"Therefore voluntary intoxication is not a defense to Rape or Attempted Murder or the included offense of Battery as charged"*. (Emphases added).

2. Subsequent to Petitioner's trial, in *Terry v. State*, 465 N.E. 2d 1085 (Ind 1984), the Indiana Supreme Court ruled the Instruction, as setforth in paragraph one (1) above constitutional.

3. At trial, Officer LoBianco testified that when he met with Petitioner, Petitioner was "high" but that he could not tell what from. That Petitioner's eyes were kind of reddish, and he (Petitioner) was very hyper, unsure of himself. (R. 220).

4. Petitioner's sister, Katherine Roberts testified that when Petitioner arrived at her house *"they were all stoned to begin with, and when I asked him what he was stoned on, he told me it was either Tuenols (phonetics) and Seconals, and they were drinking Canadian Club. It was pretty apparent they were all wrecked, all of them"*. (R. 201).

5. Miss Roberts further testified that "He (Petitioner) was severely hyped up, and it was from the drugs that had gotten him that way". (R. 311, 312).

6. Attempted Murder in Indiana is a Specific intent crime. *Norris v. State*, 419 N.E. 2d 129 (1981)

7. Petitioner in this criminal case was entitled to have the jury instructed on any theory of defense which had some foundation in the evidence. United States v. Hillsman, 522 F 2d 454 (7 Cir. 1975); *Lockridge v. State*, 359 N.E. 2d 589 (Ind App. 1977).

8. The given instruction as setforth in paragraph one (1) above was an erroneous and incorrect version of the law on Voluntary intoxication.

9. Whether or not Petitioner's voluntary intoxication prevented him from forming the necessary specific intent required for attempted murder was a question of fact for the jury and one upon which Petitioner bore the burden of proof. *Bates v. State*, 409 N.E. 2d 623, 625 Ind., (1980).

10. The crime of attempted voluntary manslaughter is an included offense of the crime of attempted murder in Indiana. *Jones v. State*, 445 N.E. 2d 92 (Ind 1983).

11. The test to be applied in Indiana when a claim is made in refusing to instruct on manslaughter as a lesser included offense of murder is:

> "was the evidence such that it, by reason of proof of sudden heat, could create a reasonable doubt in the mind of the trier of fact of the presence of the culpability for murder. *Williams v. State*, 402 N.E. 2d 954 (Ind 1980)".

12. Indiana Code (IC) 35-37-2-2(5) requires the Court to make the charge to a jury in writing, with each instruction numbered and signed by the Judge. Also:

> ". . . in charging the jury, the court must state to them all matters of law which are necessary for their information in giving their verdict. The judge shall inform the jury that they are the exclusive judges of all questions of fact, and they have a right also to determine the law".

13. IC 35-37-2-2 (6) provides:

> "If the prosecuting attorney, the defendant, or his counsel desires *special* instructions to be given to the jury, these instructions must be:
>
> > A). Reduced to writing; (B). Numbered, and (C). Signed by the party, or his attorney, who is requesting the special instructions.

14. There was evidence at the trial that the victim while wrestling and fighting over a knife, struck Petitioner in the face with a rock, and that Petitioner flipped out, and retaliated against the victim by stabbing her.

15. There was a "reasonable doubt" about the existence of the culpability of requisite for murder, and Petitioner was entitled to an instruction on voluntary manslaughter, because such an instruction would not have been a "Special Instruction", and Petitioner would not have been required to submit such to the trial Court as required by IC 35-37-2-2.

16. When the Court refused to instruct on Voluntary manslaughter, the court chose which versions of the facts it would believe, and invaded the province of the jury which denied Petitioner a fair trial, and due process of law.

17. At the conclusion of the trial, but prior to the jury returning a verdict, the trial court assigned a pro-tempore to take over the case, in order that the trial judge could attend his aunt's funeral in Illinois.

18. The pro-tempore Judge informed the jury of a death in the regular judge's family, and informed the jury, that he had been assigned to handle the case until the regular judge returned. (R. 222).

19. Informing the jury of a death in the regular judges family severely prejudiced petitioner, in that Petitioner believes the jury felt an obligation to get the matter over with and thereby "rushed" a verdict in this particular case.

CONCLUSION

WHEREFORE, Petitioner prays the writ of habeas corpus issue, and an order be entered discharging him from custody of the respondent.

RESPECTFULLY SUBMITTED

/s/ GARY JAMES EAGAN

GARY JAMES EAGAN, Petitioner
Indiana State Prison
P.O. Box 41
Michigan City, IN 46360

Gary James EAGAN, Appellant
(Defendant Below),

v.

STATE of Indiana, Appellee
(Plaintiff Below),

No. 284S45.

Supreme Court of Indiana.

Aug. 2, 1985.

Defendant was convicted in the Lake Superior Court, James E. Letsinger, J., of attempted murder. Defendant appealed. The Supreme Court, Prentice, J., held that: (1) defendant's first statement was voluntary and therefore admissible; (2) five-part waiver form presented and explained to defendant prior to his second statement fully satisfied *Miranda* requirements, and defendant's second statement was not tainted by prior confession which had been rendered without adequate warnings; thus, defendant's second statement, in which he admitted that he had stabbed victim, was admissible; (3) trial court's giving of instruction concerning defense of voluntary intoxication, which was held to be unconstitutional subsequent to defendant's trial, was not reversible error; and (4) fact that trial judge, after instructing jury, left proceedings in charge of judge pro tempore did not amount to reversible error.

Affirmed.

DeBruler, J., dissented and filed an opinion.

1. Criminal Law §531(3)

Before confession may be admitted into evidence, state must establish beyond reasonable doubt that suspect intelligently and knowingly waived his rights not to incriminate himself and to have attorney present. U.S.C.A. Const.Amends. 5, 6.

2. Criminal Law §1158(4)

Supreme Court will not reweigh evidence in evaluating trial court's decision to admit confession but will only determine

whether record includes sufficient evidence to sustain trial court's ruling the confession was voluntarily made.

3. Criminal Law §412.2(3), 1169.12

Defendant's first statement was voluntary and therefore admissible where interrogating officers had read and explained first waiver form to defendant, including advisement that defendant had right to talk to attorney before he answered any questions and to have attorney with him during questioning, and where there was no evidence that officers threatened or physically abused defendant; even if first statement should not have been admitted, admission was harmless error were defendant's first statement did not implicate him in stabbing.

4. Criminal Law §412(4), 412.2(3)

Five-part waiver form presented and explained to defendant prior to his second statement fully satisfied *Miranda* requirements, and defendant's second statement was not tainted by prior confession which had been rendered without adequate warnings; thus, defendant's second statement, in which he admitted that he had stabbed victim, was admissible.

5. Criminal Law §1038.4

Defendant's contention that instruction on lesser included offense of voluntary manslaughter should have been given jury was waived on appeal where defendant failed to tender instructions on attempted voluntary manslaughter in writing to trial court. IC 35-41-5-1, 35-42-1-3(1982 Ed.); Rules of Crim.Proc., Rule 8(A).

6. Criminal Law §1172.1(4)

Trial court's giving of instruction concerning defense of voluntary intoxication, which was held to be unconstitutional subsequent to defendant's trial, was not reversible error where, although there was some evidence presented that defendant might have been intoxicated at time he committed crime, it was never interposed as defense, and record revealed that intoxication, if existing, was not of debilitating degree that

could have raised reasonable doubt upon existence of requisite mens rea for attempted murder. IC 35-41-3-5, 35-41-5-1(1982 Ed.).

7. Judges §15(1)

Generally, judge should not be substituted over objection during course of criminal trial.

8. Criminal Law §1166.21

Fact that trial judge, after instructing jury, left proceedings in charge of judge pro tempore did not amount to reversible error where judge pro tempore performed only ministerial act of accepting verdict from jury and entertained no motions from counsel nor questions from jurors; thus, defendant could not have been prejudiced by substitution.

Dennis J. Stanton, Crown Point, for appellant.

Linley E. Pearson, Atty. Gen., Theodore E. Hansen, Deputy Atty. Gen., Indianapolis, for appellee.

PRENTICE, Justice.

Defendant (Appellant) presents this direct appeal from his conviction following a jury trial of attempted murder, Ind.Code §§35-42-1-1, 35-41-5-1 (Burns 1979 Repl.). He was sentenced to thirty-five (35) years imprisonment.

We restate Defendant's contentions as the following three issues:

(1) Whether the trial court erred in admitting Defendant's two custodial statements into evidence, and in admitting evidence police officers discovered, with Defendant's assistance, after the statements were made.

(2) Whether the trial court erred in failing to give an instruction, *sua sponte*, concerning attempted voluntary manslaughter as a lesser included offense, and erred in giving the court's Final Instruction No. 12, concerning the defense of voluntary intoxication.

(3) Whether a new trial is required because the trial judge, after instructing the jury, left the proceedings in charge of a judge *pro tempore* who performed no judicial act except to receive the jury's verdict. We find no reversible error and affirm the judgment below.

Although the evidence sharply conflicted in certain details, the record demonstrates that Defendant and several companions were driving through south Chicago and offered the victim a ride during the late evening hours May 16, 1982. Eventually Defendant, his companions and the victim joined a larger group of men, drove into Indiana and parked along the Lake Michigan shoreline. There the victim, either for payment or under coercion, engaged in sexual activities with at least several members of the group.

Defendant, his companions and the victim then separated from the larger group, and returned to the same area along the shoreline a short time later. Defendant and his companions apparently desired to continue their sexual activities with the victim, but, for reasons which are not clear from the record, she refused. A struggle ensued which ended with the Defendant stabbing the victim about nine times, then leaving her on the shore.

Defendant and his companions drove back to Chicago and stopped at his sister's home; then Defendant proceeded to his own apartment and called a Chicago police officer whom he knew. Defendant led Chicago police to the victim, who immediately asked the Defendant why he had stabbed her.

After determining that the incident had occurred in Indiana, Hammond police officers interviewed the Defendant the next day. He gave a statement admitting that he had been with the victim near the scene of her attack, but claimed that she had been attacked by a group of men who also had attacked the Defendant. After further investigation, Hammond police obtained a second statement from Defendant in which he admitted stabbing the victim. Several days later Defendant

assisted police in locating a knife and other items he had thrown into Lake Michigan after the stabbing.

Other relevant facts are stated below.

ISSUE I

Defendant claims that the trial court committed reversible error in admitting into evidence his two statements made while in custody of police officers, and in admitting a knife and other items of physical evidence that Defendant assisted police officers to locate, after he had made these statements.

Specifically, Defendant contends that, prior to giving his first statement, he was not adequately advised that if he wished to consult with counsel prior to or during interrogation but could not afford a lawyer, one would be provided for him. He argues that the first advisement of rights given by police officers indicated only that Defendant would be provided with counsel during court appearances. Although Defendant's brief appears to concede that the advisements given before the second statement were adequate, he claims that the second statement was so tainted by the first statement that neither should have been admitted. He further argues that the trial court should not have admitted various items of physical evidence that Defendant had helped police to find in Lake Michigan several days after his second statement, during which Defendant had told the officers he had thrown his knife and other items into the lake. We reject these contentions.

[1,2] Before a confession may be admitted into evidence, the State must establish beyond a reasonable doubt that the suspect intelligently and knowingly waived his rights not to incriminate himself and to have an attorney present. *See, Chamness v. State* (1982), Ind., 431 N.E.2d 474, 476; *see generally, Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed2d 694. However, this Court will not reweigh the evidence in evaluating a trial court's decision to admit a confession, but will only determine whether the record includes sufficient evidence to sustain the trial court's ruling that the confession

was voluntarily made. *See, e.g., Ortiz v. State* (1976), 265 Ind. 549, 553, 356 N.E.2d 1188, 1191 and authorities cited.

Prior to taking Defendant's first statement police officers read to Defendant, and had him read and sign, a waiver of rights form which included the following advisements:

"YOUR RIGHTS"

> Before we ask you any questions, you must understand your rights. You have this right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have the right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer."

The record contains no indication that Defendant questioned the officers or expressed any confusion concerning the content of these advisements, nor any indication that Defendant requested an attorney before or during his statement. Defendant's first statement claimed that the victim, after spending part of the evening with Defendant, had gone with other persons in a van to the Lake Michigan shoreline while Defendant followed at a distance, that the persons in the van had then approached Defendant, told him they had "dropped off" the victim, and that they then beat him. Thus, outside of Defendant's having admitted that he was with the victim the evening of the crime near the crime scene, facts which he had already reported to police officers before they took him into custody, Defendant's first statement contained nothing implicating himself in the attack upon her.

Following further investigation, police officers asked Defendant to make a second statement one day later, and he agreed. Prior to taking the second statement, police read to Defendant

and had him read and sign a waiver form which included the following advisements:

> "1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> "2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> "3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> "4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.
>
> "5. That if I cannot hire an attorney, one will be provided for me.

Defendant then, in his second statement, admitted that he had stabbed the victim. He also told the officers he had discarded a knife and other items in the lake. He later led police officers along the shoreline to where he had discarded the items, and police divers recovered them.

Defendant argues that the first waiver form indicated that he could be provided with counsel only at some future point, i.e. during court hearings. He cites *California v. Prysock* (1981), 453 U.S. 355, 101 S.Ct. 2086, 69 L.Ed.2d 696, to support his position. While *Prysock* does support the proposition that a suspect must be clearly told that counsel will be provided during interrogation, the opinion does not otherwise support Defendant's position here regarding his first statement. The *Prysock* Court found that the interrogating officer's specific statements to a juvenile suspect and his parents satisfied *Miranda* requirements.

This Court's prior decisions in *Dickerson v. State* (1972), 257 Ind. 562, 276 N.Ed.2d 845, cited by Defendant, and *Goodloe v.*

State (1969), 253 Ind. 270, 252 N.E.2d 788, are distinguishable. In *Dickerson* a suspect was presented with a waiver form very similar to the form used before Defendant's first statement in this case, but the officers did not make sure that the defendant could read the form, nor did they read and explain the form to him. *Id.*, 257 Ind. at 567-72, 276 N.E.2d at 848-51. Although we determined that the defendant was not given adequate *Miranda* warnings, the error was deemed harmless in light of the overwhelming evidence of the defendant's guilt. *Id.*, 257 Ind. at 572-74, 276 N.E.2d at 851. In *Goodloe* the arresting officer's advisements were patently inadequate and incomplete, and clearly did not inform the appellant that "she had a right to an attorney prior to [or during] interrogation." *Id.*, 253 Ind. at 275-76, 252 N.E.2d at 791-92.

[3] This case is more analogous to *Jones v. State* (1969), 253 Ind. 235, 238-44, 252 N.E.2d 572, 573-77 (DeBruler and Jackson, JJ., dissenting), *cert. denied* (1977) 431 U.S. 971, 97 S.Ct. 2934, 53 L.Ed.2d 1069, where this Court upheld admission of a confession made after the defendant had been presented with advisements virtually identical to the first advisements provided the Defendant here, and the interrogating officers had explained them. In this case the record also demonstrates that the interrogating officers read and explained the first waiver form to Defendant. There is no evidence that the officers threatened or physically abused him. The advisements form included the statement "(y)ou have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning, . . . even if you cannot afford to hire one." We conclude that the record supports the trial court's conclusion that Defendant's first statement was voluntary, and therefore admissible.

[4] Assuming, *arguendo*, that Defendant's first statement should not have been admitted, we conclude the error was harmless. Outside of admitting that he was with the victim the night of the crime, which police officers already knew, Defendant's first statement did not implicate himself in her stabbing. The five-part waiver form presented and explained to Defen-

dant prior to his second statement fully satisfied *Miranda* requirements and, as the State emphasizes, was substantially approved by this Court in *Robinson v. State* (1979), 272 Ind. 312, 315-16, 397 N.E.2d 956, 958-59. This is not a case where a second confession, preceded by proper *Miranda* warnings, was nevertheless so tainted by a suspect's prior confession rendered without adequate warnings that the second confession should have been excluded as well as the first. Defendant was fully advised of his rights to counsel before his second, substantially inculpatory statement was given to police, and it properly was admitted.

ISSUE II

Defendant contends that the trial court erred in failing to give, *sua sponte*, an instruction allowing the jury to convict him of the lesser included offense of attempted voluntary manslaughter, see Ind.Code §§35-42-1-3, 35-41-5-1 (Burns 1979 Repl.), and erred in giving the court's Final Instruction No. 12 concerning voluntary intoxication as a defense. We find no reversible error.

[5] Regarding the failure to give a lesser included offense instruction the State argues, and we agree, that this contention is waived on appeal because Defendant failed to tender instructions on attempted voluntary manslaughter in writing to the trial court. *See, e.g., Anderson v. State* (1984), Ind., 469 N.E.2d 1166, 1168, *cert. denied* (1985), _____ U.S. _____, 105 S.Ct 1220, 84 L.Ed.2d 361; *Thomas v. State* (1983), Ind., 443 N.E.2d 1197, 1200; Ind.Rules of Procedure, Criminal Rule 8(A).

Defendant further argues that the trial court erred in giving its final Instruction No. 12 concerning the defense of voluntary intoxication, which was as follows:

> "The defense of intoxication is defined by law as follows:
>
> It is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, if the intoxication resulted from the introduction of a substance into his body, without his consent or when he did not know that the substance might cause intoxication.

> Voluntary intoxication is a defense only to the extent that it negates an element of the offense referred to by the phrase 'with intent to' or 'with an intention to.'
>
> Therefore voluntary intoxication is not a defense to Rape or Attempted Murder or the included offense of Battery as charged."

[6] The instruction was taken from Ind. Code. §35-41-3-5, as amended by Acts 1980, P.L. 205, Sec. 1. However, subsequent to Defendant's trial, that statute was held to be unconstitutional in *Terry v. State* (1984), Ind., 465 N.E.2d 1085, wherein the defense of voluntary intoxication was thoroughly reviewed. Nevertheless, we find no reversible error in the court's having given the instruction. Although there was some evidence presented that the Defendant may have been intoxicated at the time he committed the crime, it was never interposed as a defense; and the record reveals that his intoxication, if existing, was not of the debilitating degree that could have raised a reasonable doubt upon the existence of the requisite *mens rea*.

Defendant did not testify. The only evidence of his intoxication came from Officer LoBianco and from Defendant's sister, Katherine Roberts. Defendant went to his sister shortly after the event and told her of the episode. She counseled him to call their acquaintance, Officer LoBianco, which he did, shortly thereafter. LoBianco met Defendant about one-half hour later, and they returned to the crime scene together, where they found the victim, still alive.

Mrs. Roberts testified that when Defendant, in the early morning hours, came to her with some of his friends, ". . . . they were all stoned to begin with, and I asked him what he was stoned on. He told me it was either Tuenols (phonetics) and Seconals, and they were drinking Canadian Club. It was pretty apparent they were all wrecked, all of them." She also testified that he appeared to be hyper. ". . . He was severely hyped up, and it was from the drugs that had gotten him that way."

Officer LoBianco testified that when he first saw Defendant he was "high" but that he could not tell what it was from, that

". . . his eyes were kind of reddish. He was very hyper, unsure of himself."

Defendant gave two statements to the police, one at eleven fifteen in the morning of May 17 and the second one at four twenty-five on the afternoon of May 18. By the first statement, he admitted having been with the victim earlier but that it was others who had attacked and injured her. By the second statement, he admitted that it was he and his companions who had beaten and stabbed her. In neither statement, however, did Defendant make any claim that he was intoxicated or under any disability at any time during the criminal episode.

Immediately following the criminal events, Defendant drove an automobile through the city streets some considerable distance, to the home of his sister, reported the episode to her and asked for assistance for his friend who had been cut. He had the presence of mind to heed her advice and to contact Officer LoBianco, to guide him back to the scene of the crime and to fabricate a story concerning his involvement. The only relevant evidence belied a mental state so impaired by alcohol or drugs as to preclude the existence of the *mens rae*. The issue was simply not present, hence the giving of the instruction, although error, was harmless.

ISSUE III

Defendant argues that he is entitled to a new trial because the trial judge, after instructing the jury, left the proceedings in the charge of a judge *pro tempore* when he left Indiana to attend a relative's funeral. We find no reversible error in this case.

[7] Defendant relies on *Bailey v. State* (1980), Ind.App., 397 N.E.2d 1024 *(trans. denied)*. In *Bailey*, which is apparently the only prior Indiana case to face this issue, our Court of Appeals concluded that a new trial was required because the trial judge had assigned the case to a judge *pro tempore* after the jury had been empaneled and one witness had testified. We decline the State's invitation to overrule *Bailey* in this case, and

indeed agree with the *Bailey* court's statement that, as a general rule, a judge cannot be substituted over objection during the course of a criminal trial. *Id.*, 397 N.E.2d at 1026. The trial judge may be required to make various evidentiary rulings or to decide motions stemming from prior events during the trial with which the presiding judge must be familiar.

[8] However, we do not read *Bailey* as creating a *per se* rule, and conclude that it is distinguishable. The judge *pro tempore* here performed only the ministerial act of accepting the verdict from the jury. He entertained no motions from counsel nor questions from jurors. Thus, we conclude that Defendant could not have been prejudiced by the substitution.

The judgment of the trial court is affirmed.

GIVAN, C.J., and PIVARNIK, J., concur.

DeBRULER, J., dissents with opinion.

HUNTER, J., not participating.

DeBRULER, Justice, dissenting.

For better or for worse, there is a right to remain silent in the face of custodial interrogations. There is also a right to confer with counsel in the inner sanctums of police stations before custodial police interrogations, and to have counsel present during such interrogations. And the constitution requires that these rights be extended and made meaningful for the poor, the illiterate, and the ignorant, as well as the not-so-poor, the educated, and the well-informed. To these constitutionally mandated ends, an advisement of these rights must be given openly and plainly and in a helpful manner, and the tools for their utilization thusly placed in the hands of arrested persons. *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Did appellant receive this information and these tools before either of his two custodial interrogations? The answer is no. The first time he was told by authorities in the basement of a city police station that his present and immediate right and need for counsel could not be fulfilled until some indistinct future time, "if and when" he went to court. This

advisement is condemned by the holding in *California v. Prysock* (1981), 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696, despite protestation to the contrary in the majority opinion. The second advisement is drawn so as to be uncertain on the question of time, that is, it does *not* inform the arrested person that he can have a free lawyer *now*. This uncertainty does not stand alone and in isolation, but is supplied with additional wrong meaning by the advisement given appellant on the same subject shortly before, which clearly and unmistakably said that free lawyers may be had only at some point in the future, ie., "if and when" you go to court. These circumstances do not support the conclusion reached by the majority that appellant, through the second set of advisements, was fully advised of his right to counsel as required by the constitution. I vote therefore to reverse this conviction and order a new trial at which appellant's pre-trial statements resulting from the two custodial interrogations and any physical exhibits produced through them are excluded.

tle Omitted in Printing)

STATE OF INDIANA

VS

GARY J. EAGAN

CAUSE NO. 2CR-116-582-468

MOTION TO SUPPRESS
MOTION IN LIMINE

11-19-82

[IN THE SUPERIOR COURT OF LAKE COUNTY
CRIMINAL DIVISION
CROWN POINT, INDIANA]

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE SUPERIOR COURT OF LAKE COUNTY
CRIMINAL DIVISION
CROWN POINT, INDIANA

STATE OF INDIANA)
)
VS) CAUSE NO. 2CR-116-582-468
)
GARY J. EAGAN)

APPEARANCES:

HONORABLE JAMES E. LETSINGER,
PRESIDING JUDGE

MR. DANIEL BELLA, DEPUTY
PROSECUTOR FOR THE STATE
OF INDIANA

MR. DAVID R. SCHNEIDER, PUBLIC
DEFENDER FOR THE DEFENDANT

BE IT REMEMBERED, that heretofore, on the 19th day of November, 1982, the above-entitled cause came on for MOTION TO SUPPRESS and MOTION IN LIMINE, before the HONORABLE JAMES E. LETSINGER, Judge of the Superior Court of Lake County, Criminal Division, Room #2, sitting at Crown Point, Indiana. [Supp Tr. 2]

WHEREUPON THE FOLLOWING PROCEEDINGS WERE TAKEN AND TRANSCRIBED BY OFFICIAL COURT REPORTER, DEBRA S. BANACH, ON NOVEMBER 19, 1982.

BY THE COURT:

All right, Gary Eagan.

BY MR. SCHNEIDER:

There are two motions. I filed a motion to suppress statements given by my client, and then Mr. Bella has — I believe going to file a motion in Court this morning.

BY MR. BELLA:

I have a motion in limine as well.

BY THE COURT:

This is due up when?

BY MR. SCHNEIDER:

Monday morning for jury trial.

BY THE COURT:

All right. Ready for the evidentiary part of the hearing?

BY MR. SCHNEIDER:

Yes. Does the Court wish to proceed on the motion to suppress first or Mr. Bella's motion? All right. Why don't we do the motion to suppress first? [Supp Tr. 3]

BY THE COURT:

All right.

BY MR. SCHNEIDER:

Officer Raskosky.

ROGER RASKOSKY,

having been first duly sworn upon his oath, testified as follows:

DIRECT-EXAMINATION
BY
MR. SCHNEIDER:

Q. Please state your name.

A. Roger Raskosky, R-a-s-k-o-s-k-y.

Q. And you're employed as a Hammond police officer, is that correct?

A. Yes, I am.

Q. And to what division are you assigned? What is your rank?

A. I'm a detective sergeant in the Vice Division right now, at the present time.

Q. Excuse me. Were you in the Vice Division in May of 1982?

A. No, I was not. I was assigned to the Detective Bureau.

Q. And you were involved in a case where Gary was eventually charged with rape and attempted murder, is that correct? [Supp Tr. 4]

A. Yes.

Q. What was your involvement in this case?

A. I had obtained some statements from the defendant and also some other witnesses in the case and collected some evidence.

Q. And do you have the originals of those statements with you?

A. Yes, I do.

Q. All right.

DEFENDANT'S HEARING EXHIBITS MARKED A AND B BY THE REPORTER AT THIS TIME.

BY MR. SCHNEIDER:

Q. Detective Raskosky, I'm going to show you what's been marked as Hearing Exhibit A and ask you if you can identify that?

A. Yes, this is a voluntary appearance, advice of the Miranda warnings that was signed on 5-17 of '82 at 11:16 a.m. by the defendant, and attached is a statement that was taken by the defendant on 5-17 of '82 at 11:30 p.m. — I'm sorry, I correct myself.

Q. 11:30 a.m.?

A. Yes. It must have been the same time, 11:30 a.m., yes. [Supp Tr. 5]

Q. All right. Now, with reference to the first page of Hearing Exhibit A, which is a printed form, which says voluntary appearance and advice of rights, can you explain what procedure you followed on May 17th of 1982, as far as Mr. Eagan is concerned?

A. Yes, I have a copy identical to this in front of myself. One is given to Mr. Eagan. I read the entirety of this paper to him, asked him to read it back to me and asked him if he understood everything, whole or in any part, the question, anything on the paper, at which time he said he understood everything on the form, and I asked him to sign it.

Q. All right, and on page one, as I mentioned, part of it is printed, and there are several lines where there is printing and/or writing, is that correct?

A. Yes.

Q. And who filled in those lines?

A. Everything was filled in on the waiver form except for the signature, down where it says witness, where I signed it; everything else was filled in by the defendant.

Q. Mr. Eagan, is that correct? [Supp Tr. 6]

A. Yes.

Q. And the taking of this statement, which is captioned, Voluntary Statement, it indicates that Officer Baughman was in there at that time also, is that correct?

A. To the best of my recollection he was there, present the whole time of the taking of that statement, yes.

Q. You're the officer who did the questioning and the typing, is that correct?

A. We jointly questioned him, and I typed it, yes.

Q. All right. At the time you questioned Gary Eagan, when you took Hearing Exhibit A, starting around 11:14 a.m. May 17th, 1982, how did Mr. Eagan appear to you at that time?

A. He appeared — how do you mean by appearance? Physical appearance?

Q. Clothing, speech — well, let me rephrase that. Was his speech slurred in any way?

A. He didn't appear to be intoxicated, if that's what you mean. He appeared to be distraught, maybe a little tired, but he appeared to have all his faculties about him. He understood everything as we asked him. [Supp Tr. 7]

BY THE COURT:

The question was was his speech slurred in any way?

BY THE WITNESS:

A. No, his speech was not slurred.

BY MR. SCHNEIDER:

Q. Were his eyes glassy, that you recall, glazed over?

A. They might have been a little glassy, yes.

Q. At any time did he question any of the rights which appeared on the waiver form?

A. No. On the waiver form, we asked him — we advised him of each right individually on the form and asked him each time if he was aware of what we were advising him, and he stated yes, he understood everything.

Q. And once you were satisfied in — excuse me. Once you were satisfied in your own mind that he appeared to understand what you were asking him, did you have him sign the form, and you then proceeded to take the statement?

A. Yes.

Q. And how many years have you been a police officer? [Supp Tr. 8]

A. Six years.

Q. All right. How many statements have you taken over that period of time?

A. Approximately thirty.

Q. Excuse me, one other question. Is the first time you had met Gary Eagan was at 11:14 that morning?

A. No. it was not the first time.

Q. What time had you met Gary Eagan?

A. The first time we met Mr. Eagan, it was earlier that morning, when we first came to work, approximately, I'd say, between 8:00 or 8:30 that morning up at the lakefront from the Robertsdale area of Hammond.

Q. And at that time was Mr. Eagan transferred to, I guess, to your custody from Chicago Police Department?

A. No. At that time Mr. Eagan stated that he was a victim of a battery, and he wished to make out a police report, an offense report, to obtain a warrant against the people that beat him up, and he was transported to our Robertsdale station on his own. He wanted to go by himself to make a police report out.

Q. And what — and your first meeting with him then would have been the Robertsdale station? [Supp Tr. 9]

A. It was at the lakefront. He was with two Chicago detectives.

Q. How did he appear to you at that time, as far as speech, his eyes?

A. About the same.

Q. All right, so you noticed no change in condition from 8:00 or 8:30 in the morning?

A. Other than he was maybe more weary, when we saw him later on at the station, more tired. Other than that, he was about the same.

Q. Okay. I'm going to show you what has been marked as Hearing Exhibit B and ask you if you can identify that?

A. This is a waiver, advice of Miranda warnings that was read to Gary Eagan. That would have been on 5-18 of '82 at 4:21 p.m., by myself, and attached is a statement.

Q. All right, and page one of this waiver and statement is a different waiver form than the other one, is that correct, Hearing Exhibit A?

A. Yes, it is.

Q. Is there any reason why the difference in waiver sheets? [Supp Tr. 10]

A. The first one is a voluntary appearance. It states so on top, he voluntarily appeared to give a statement. This advice of Miranda warnings, this waiver that we have him sign is, once they're placed under arrest, then we take them for questioning. We advise them of their rights on this. This is a different form.

Q. Then are you saying that when you took the first statement, he was not under arrest?

A. Right.

Q. But you went through his rights?

A. You still give him the rights, yes.

Q. Was he advised that there may have been probable cause to charge him with rape and attempted murder at that time?

A. At that time we were obtaining the statement from him, as to what his observations were or anything that he could remember that took place at the lakefront. He wasn't a suspect at that time.

Q. Was it more to — mayber I'm putting words in your mouth, to get some basis for the battery charge he was complaining of?

A. It's going to be hard to explain without going into detail, but Mr. Eagan states that he was assaulted at the lakefront. He wanted to make out an offense report against the subjects that beat him up. He voluntarily went with one of our officers to the [Supp Tr. 11]

Robertsdale station. When we were finished gathering what evidence we could at the lakefront, we went to the Robertsdale station and asked Mr. Eagan if he would voluntarily come into the station so we could obtain a statement from him, what he observed that night. He voluntarily went with us to the station. After obtaining that statement, there were things that weren't consistent in his statement, that just didn't follow, so we held him overnight for probable cause and charged him the following day.

Q. And as — that's when you took the information contained in Hearing Exhibit B, is that correct?

A. Yes.

Q. And would this also be after you had done some more investigation and talked to other people? [Supp Tr. 12]

A. Yes, it was.

Q. What procedure did you follow when you went through the waiver on Hearing Exhibit B?

A. Same thing, I had a form identical to this one in front of me. I read the whole thing in its entirety to Mr. Eagan, had him read it back to me, asked him if there was any part of it that he didn't understand or questionable to him. He stated that he understood everything on the form, and I had him sign it.

Q. All right, and how long did it take for you to go through Hearing Exhibit B? What time did it start, and what time did it end?

A. It started at 4:21 p.m., and this should be 4:25 p.m., but it's hard to make out. It says 5:25. It was actually 4:25 at the very bottom here. This might be where we completed the statement. It took approximately three to five minutes to read the waiver of his rights to him.

Q. But apparently, the top of page two, it says 4:24 p.m.?

A. That would be where we finished the statement.

Q. At what, 4:25 or 5:25? [Supp Tr. 13]

A. 5:25 when we finished the statement.

Q. Was the same procedure you had followed the day before, namely, that both you and your partner did the questioning, and you did the typing?

A. Yes. Let me see, yes, I typed this out, and my partner was present at the time.

Q. How was Mr. Eagan's speech on May 18th, 1982?

A. I'm sorry?

Q. How was his speech on May 18th, 1982?

A. How was his speech?

Q. Yes.

A. Normal.

Q. All right, and eyes that day were not glazed over?

A. No, they appeared to be okay.

Q. And then it's your opinion that the remarks he made to you, Hearing Exhibit A and Hearing Exhibit B, were voluntary, is that correct?

A. Yes, they were.

BY MR. SCHNEIDER:

No further questions ast this time, your Honor.

[Supp Tr. 14]

CROSS-EXAMINATION

BY

MR. BELLA:

Q. Sergeant, did you give Mr. Eagan his rights both times; you took both the statements?

A. Yes, I did.

Q. Did he seem to understand those rights each time you advised him of those rights?

A. Yes, he did.

Q. During the taking of the two statements, did Mr. Eagan seem to understand the questions you asked of him.

A. Yes, he understood everything I asked him.

Q. And were his answers responsive to those questions

A. Yes, he — in fact, the majority of the statements are in the narrative form from Mr. Eagan.

Q. He seemed to understand everything, entire procedure of taking the statement, from advising of rights throughout the questioning?

A. Yes, he did.

BY MR. BELLA:

Okay, thank you very much. I have nothing else.

BY MR. SCHNEIDER: [Supp Tr. 15]

Nothing further of this witness, Your Honor.

BY THE COURT:

You're excused. You may go or stay as you choose.

(WITNESS EXCUSED.)

BY THE COURTS:

Next witness.

BY MR. SCHNEIDER:

Officer Baughman.

THOMAS BAUGHMAN,

having been first duly sworn upon his oath, testified as follows:

DIRECT-EXAMINATION

BY

MR. SCHNEIDER:

Q. Please state your name, spell your last name for the court reporter.

A. Thomas J. Baughman, B-a-u-g-h-m-a-n.

Q. And you are also employed as a Hammond police officer, is that correct?

A. Yes, sir.

Q. And May of 1982, you were also assigned to the Dectective Bureau? [Supp Tr. 16]

A. In May?

Q. Yes.

A. Yes.

Q. And at that time you were Officer Raskosky's partner?

A. Yes.

Q. And when did you first come in contact with Gary Eagan?

A. When did I first come in contact with Gary Eagan?

Q. Yes.

A. On the lakefront of Lake Michigan, by the Commonwealth Edison plant.

Q. And that would be what Officer Raskosky just testified to, is that correct?

A. Correct.

Q. And at that time you had been advised that Mr. Eagan advised you that he had been assaulted?

A. That's correct.

Q. When he was transported to the Robertsdale station, was he transported by you or were the Chicago Police present at that time?

A. The Chicago Police were present, but he wasn't transported by me. [Supp Tr. 17]

Q. All right. Hearing Exhibit A, you are familiar with the file, aren't you?

A. Yes, sir.

Q. All right. Hearing Exhibit A is the first voluntary — allegedly voluntary statement that was taken from Eagan. Were you present when Officer Raskosky read through the rights?

A. Yes, I was. I was sitting at my desk.

Q. Was this in the Robertsdale station or at the main —

A. Main station.

Q. You did not witness — your signature does not appear on the voluntary Miranda?

A. Correct.

Q. Waiver form, is that correct, but in the statement which was taken, your signature appears on each page, is that correct?

A. Yes, sir, it does.

Q. And is it also correct that both you and Officer Raskosky did the questioining to your recollection?

A. To my recollection, there were certain questions that I asked and he typed out.

Q. I'll ask you the same question; how did Mr. Eagan appear to you when you were taking the statement the first day, May 17th? [Supp Tr. 18]

A. The first day?

Q. Yes.

A. He appeared to be normal to me.

Q. Was his speech slurred in any way?

A. Pardon me, sir?

Q. Was his speech slurred in any way?

A. Not that I recall.

Q. Eyes glazed over or anything like that?

A. Not that I recall.

Q. Would your observations be that he may have been tired?

A. It's a possibility.

Q. And how did Mr. Eagan appear to you around 11:14 a.m., as compared to when you first saw him earlier that morning?

A. He seemed about the same.

Q. No noticeable difference, as far as you were concerned?

A. No.

Q. All right. Hearing Exhibit B is the second statement that was taken, is that true?

A. Yes.

Q. And your signature does not appear on the first page of the waiver and statement, but it does appear on the subsequent pages, is that correct? [Supp Tr. 19]

A. That's correct.

Q. Would the procedure have been the same; you may have asked some questions; Officer Raskosky did the typing?

A. Yes, sir.

Q. How many years have you been a police officer?

A. Since 1964.

Q. And how many statements have you taken?

A. Probably about three, four hundred.

Q. All right, and the eighteen years - well, strike that question.

When you took the first statement — and is it correct that Mr. Eagan was not a suspect at that time?

A. That's correct.

Q. Had you had any conversations with — had you personally had any conversations with Officer Lobianco (phonetic) of the Chicago Police Department at that time?

A. Not at the time of the first statement.

Q. All right. At the second statement you had, though, is that correct? [Supp Tr. 20]

A. That's correct.

Q. And during the thirty some hours, approximately, between the time you began statement one and the time you took statement two, you and Officer Raskosky had done some investigating, is that correct?

A. That's correct.

Q. Is it your opinion, as a police officer, that the remarks — the information contained in Hearing Exhibit A and Hearing Exhibit B were made voluntarily by Mr. Eagan?

A. Would you repeat?

Q. Is it your opinion, as a police officer, that the remarks — the information contained in Hearing Exhibit A and Hearing Exhibit B were made voluntarily by Mr. Eagan?

A. Yes.

Q. At no time did he question you as far as any of his rights?

A. No, sir.

BY MR. SCHNEIDER:

Nothing further of this witness, Your Honor. [Supp Tr. 21]

CROSS-EXAMINATION
BY
MR. BELLA:

Q. Officer, was Mr. Eagan given his rights before each of the two statements?

A. Was he given his rights before?

Q. Before both statements?

A. Yes.

Q. And did he seem to understand his rights and the entire course of taking of the statements?

A. Yes, he did.

BY MR. BELLA:

Thank you very much. I have nothing further.

BY MR. SCHNEIDER:

Nothing further of this witness, Your Honor.

BY THE COURT.

You're excused. You may go or stay as you choose.

(WITNESS EXCUSED.)

BY MR. SCHNEIDER:

For purposes of this hearing, I would call the defendant, Gary Eagan.

GARY EAGAN,

having been first duly sworn upon his oath, testified as follows: [Supp Tr. 22]

DIRECT-EXAMINATION

BY

MR. SCHNEIDER:

Q. Please state your name.

A. Gary Eagan.

Q. Mr. Eagan, prior to your arrest, where did you live? Before you were arrested, where did you live?

A. 133rd and Baltimore.

Q. And that was what, Hegewisch section of Chicago?

A. Yes.

Q. You were arrested — you were taken into custody by both the Chicago Police and the Hamnond Police on May 17th, 1982, is that correct?

A. Yes.

Q. All right. You've heard both officers testify that at some point, the early morning hours of May 17th, approximately

eight o'clock, you were taken to the Robertsdale section, to the Robertsdale Police Station; do you recall that?

A. I don't remember being at Robertsdale. [Supp Tr. 23]

Q. Do you recall being at the Hammond Police Station?

A. Yes, some.

Q. And do you recall when this first statement was taken from you?

A. Not all of it, no.

Q. What do you mean you don't recall all of it?

A. I remember being there, and that's about it. It was, how could I say it, it was like I wasn't there, really.

Q. You had taken or the day before you consumed quite a bit of alcohol and pills, is that correct?

A. Yes.

Q. Do you recall what you had taken the day before?

A. I was drinking Canadian Club all day, and that night I took some Tulenols. (phonetic)

Q. Two Tulenols?

A. Yes.

Q. Do you remember going to the or alking with Officer Lobianco the early morning hours of May 17th? [Supp Tr. 24]

A. No.

Q. No?

A. No.

Q. As far as May 17th, at the Hammond Police Station, I'm going to show you what's been marked as Hearing Exhibit A, which appears to be a voluntary appearance, advice of rights. Is this your signature, appear to be your signature on that page where it says waiver?

A. Yes.

Q. And where it says signed Gary J. Eagan, is that your signature?

A. Yes.

Q. All right, and page one, there is a signature which appears there, Gary Eagan, is that your signature?

A. Yes.

Q. Page two, is that your signature?

A. Yes.

Q. All right. Do you recall giving any part of this statement?

A. Not really, no.

Q. The signatures which appear on here, do they — is that your signature as it appears when you are sober?

A. No. [Supp Tr. 25]

Q. I'm going to show you Hearing Exhibit B, and this is also captioned waiver and statement, dated May 18th, 1982. Do you recall giving this statement to Officers Raskosky and Baughman?

A. Some of it.

Q. Do you recall some of this?

A. Yes.

Q. Is this your signature which appears on page one?

A. Yeah.

Q. Where it says waiver, Gary J. Eagan; several lines down it also says Gary J. Eagan?

A. Yeah.

Q. That is your signature, page one, your signature?

A. Yes.

Q. Page two, your signature?

A. Yes.

Q. All right, and are you saying parts of this — parts of it you don't remember?

A. Right.

Q. You had not consumed any alcohol or pills between the time you gave the first statement and the time you gave the second statement? [Supp Tr. 26]

A. No, sir. I was going through withdrawals.

Q. And you were being held in the Hammond Police Station at this time, is that correct?

A. Yes.

Q. And neither of those situations, do you recall whether or not either Officer Raskosky or Officer Baughman made any representations to you, one way or another, if they said anything to you?

A. They were asking me some questions.

Q. All right, but your recollection is you really don't remember a lot of what went on?

A. No.

Q. Either because you were under the influence of alcohol and/or pills, or you were going through withdrawals, is that correct?

A. Yes.

Q. Before May 17th, 1982, had you ever given a statement to the police before?

A. No.

BY MR. SCHNEIDER:

No further questions at this time.

CROSS-EXAMINATION

BY

MR. BELLA: [Supp Tr. 27]

Q. Mr. Eagan, what was it you said you had taken or consumed?

A. Canadian Club and and Tulenols.

Q. Canadian Club and what else?

A. Tulenols.

Q. And when had you taken these items?

A. I had been drinking Canadian Club all day, and I took the Tulenols that night.

Q. All day on what day would that have been?

A. The 16th.

Q. And when did you take these — first of all describe what you mean — what are Tulenols?

A. In prescription, I guess they're a tranquilizer.

Q. And when had you taken those?

A. The night of the 16th.

Q. Where — about what time and where would you have taken those?

A. I was at my house in Hegewisch.

Q. About what time had you taken those?

A. Probably about eight o'clock.

Q. Have you looked over the two statements which have been introduced today as Hearing Exhibits A and B? [Supp Tr. 28]

A. Yes, I have.

Q. And those are fairly detailed statements, are they not, about your activities?

A. Pardon me?

Q. Those statements are fairly detailed, are they not?

A. What do you mean by detailed?

Q. As far as exactly what you did on the evening of the 17th and the morning of the 18th?

BY MR. SCHNEIDER:

I'll object to the way that question is phrased. I think what happened is going to be a question of fact for the jury.

BY THE COURT:

The objection is overruled. You may answer.

BY THE WITNESS:

A. Not really detailed, no.

BY MR. BELLA:

Q. In those statements you referred to the times you did certain things, the locations at which you picked up certain people and dropped certain people off, isn't that correct? [Supp Tr. 29]

A. Yeah.

Q. And who you were with?

A. Yeah.

Q. Your second statement wasn't given until around 4:00 or 4:30 in the afternoon of the 18th, isn't that right?

A. I think so, yes.

Q. And you were — you first met the Hammond Police in the morning on the 17th, the day before?

A. I think so.

Q. You haven't taken any further drugs or anything of that sort from the time you met the police in the morning on the 17th to the time you gave the second statement?

A. No.

Q. Your signature, as a matter of fact, appears pretty much the same on both those statements, does it not?

A. Yeah.

BY MR. BELLA:

Thank you. I have nothing further.

BY MR. SCHNEIDER:

All right, just one more quesion. [Supp Tr. 30]

REDIRECT-EXAMINATION

BY

MR. SCHNEIDER:

Q. When you were going through withdrawal on the 17th and 18th, what do you actually mean when you say you were going through withdrawal?

A. I wasn't really myself.

Q. In what way?

A. I was sick, dizzy, tired, wasn't able to eat.

BY MR. SCHNEIDER:

No further questions of Mr. Eagan.

RECROSS-EXAMINATION

BY

MR. BELLA:

Q. You refer to withdrawal symptoms. Were you shaking or anything of that sort?

A. Yes.

Q. I see, and I have nothing further.

BY MR. SCHNEIDER:

Nothing further of Mr. Eagan. I would like to recall Detective Raskosky for one brief series of questions. [Supp Tr. 31]

BY THE COURT:

You may step down.

ROGER RASKOSKY,

having been previously duly sworn upon his oath, testified as follows:

DIRECT-EXAMINATION

BY

MR. SCHNEIDER:

Q. Detective Raskosky, the times of the taking of these statements, May 17th, Officer Baughman was with you that entire period of time, is that correct?

A. To the best of my recollection, yes.

Q. May 17th, 1982, with reference to Hearing Exhibit A, prior to, during the taking of or after the statement was taken, were any promises, threats or inducements made by either you or Officer Baughman, while in your presence to Mr. Eagan?

A. No.

Q. Nothing about what would happen if this case would come to trial? Of course, on that point he hadn't been charged?

A. On the 17th, he hadn't been charged yet.

Q. Your testimony is no representations, one way or the other, by you or Officer Baughman on that day? [Supp Tr. 32]

A. No.

Q. May 18th, 1982, Hearing Exhibit B, same question; any promises, threats, or inducements made by either you or Officer Baughman?

A. No.

Q. At that time Mr. Eagan had been charged?

A. Yes.

Q. No representations made that if he made any statement to you, might be easier on him.

A. No.

Q. And would that be your procedure?

A. That's normal procedure for us. We don't promise anybody anything.

Q. Okay, and Officer Baughman was with you that entire period on May 18th, 1982?

A. Yes, he was.

Q. And no representations were made to Mr. Eagan by him, while in your presence?

A. Not while in my presence, no.

BY MR. SCHNEIDER:

No further questions.

CROSS-EXAMINATION

BY

MR. BELLA: [Supp Tr. 33]

Q. Did you at any time observe Mr. Eagan physically sick or shaking to the point where he could not understand or comprehend what was going on?

A. No, he didn't appear to be sick to me.

BY MR. BELLA:

Thank you. I have nothing else.

REDIRECT-EXAMINATION

BY

MR. SCHNEIDER:

Q. On that particular issue, though, May 17th and May 18th, were you working on any other cases, other than Mr. Eagan's case?

A. No, just strictly Mr. Eagan's case.

Q. You were doing a fair amount of fieldwork at that time, is that true?

A. On the early morning of the 17th and on the 18th in the morning also, I believe, yes.

Q. The 18th you were questioning the victim in the hospital, is that correct?

A. No, that's not.

Q. Did you question the victim at all?

A. The first statement that was taken from the victim was by my partner on the 18th. [Supp Tr. 34]

Q. Did you observe Mr. Eagan in the Hammond City Jail on either the 17th or 18th of May, 1982?

A. Yes, I did.

Q. How many times?

A. In the jail itself?

Q. Yes.

A. That would be on two occasions, I believe.

Q. During either of those occasions, did he appear to you to be going through withdrawals?

A. No, he did not.

Q. In the six years you have been a police office, have you ever seen any suspects or any individuals going through narcotic withdrawals?

A. Yes, I have.

BY MR. SCHNEIDER:

Nothing further.

BY MR. BELLA:

I have nothing.

BY THE COURT:

You may step down.

BY MR. SCHNEIDER:

Nothing further. No further evidence from the defendant. [Supp Tr. 35]

BY MR. BELLA:

State summons no witnesses, Your Honor.

BY THE COURT:

Argument on behalf of the motion?

BY MR. SCHNEIDER:

Yes, Your Honor. At this time the Court is well aware of what the burden is. At this point the State has the burden of showing that any statements made by Mr. Eagan were freely and voluntarily given.

I think there is some evidence from Mr. Eagan that he may have been under the influence of narcotics and/or alcohol and/or going through withdrawal during the two days, thirty-some hours when these statements were being taken.

This Court has stated before that intoxication alone would not be sufficient to grant a motion to suppress, but I would ask the Court to consider that as one of the factors to granting the motion to suppress, and not allow the statements introduced into evidence.

BY THE COURT:

Mr. Bella?

BY MR. BELLA:

Thank you, Your Honor. Both officers testified that Mr. Eagan was given his rights prior to the taking of both statements, and that he understood the rights that were given to him. [Supp Tr. 36]

They also testified that he appeared to understand all their questions. His answers were responsive. I suggest the statements speak for themselves to a certain extent; that his answers were also quite detailed and made sense. They were sensible answers.

I think the Court could find from that testimony and from the statements themselves that the defendant understood what was going on and knew what he was doing when he gave these statements.

In addition, the officers did not observe the defendant physically ill or having withdrawal symptoms. On the whole, the record shows the statements were free and voluntarily given, and the defendant knew what was going on.

BY THE COURT:

Rebuttal?

BY MR. SCHNEIDER:

No rebuttal. [Supp Tr. 37]

BY THE COURT:

Motion is denied. On State's motion in limine?

BY MR. BELLA:

Well, Your Honor, briefly, the facts I expect will come out into evidence were that the defendant met up with the victim sometime during the evening of the 16th, and victim and defendant, along with some other individuals, went to an isolated area across the state line in Hammond, and at that point certain sexual acts occurred, and the defendant stabbed the victim.

The State's contention is that any evidence about the victim being either a drug addict or a prostitute or pregnant at the time of the offense would be irrelevant to the charges.

Rape-shield law, the State would argue, would protect evidence of the victim's being a prostitute and also evidence of her pregnancy and evidence of her being a drug addict, the State would argue, is irrelevant to the charges here and has nothing to do with the facts of the case and would only serve to unduly prejudice or inflame the jury, without adding much probative value to the evidence in the case. [Supp Tr. 38]

BY MR. SCHNEIDER:

All right. My response to that would be several responses. As far as the issue of whether or not the victim, Katy Williams, was a prostitute, a number of — at least in the discovery, there are a number of individuals who may have had sex with the victim that evening. Mr. Eagan has been charged in Count I, I believe, of the crime of rape, and I think reputation is or comments made by some of these witnesses, as well as comments to certain police officers by Mr. Eagan, would go to the issue of whether or not any sexual acts were voluntary or forcibly against the victim, and I think this information should be brought before the jury.

BY THE COURT:

State, how do you answer that, that the negotiation for sex for a price goes directly to the heart of the issue of whether or not sex was voluntary or otherwise?

BY MR. BELLA: [Supp Tr. :39]

Well, Your Honor, I think the defendant can argue or present the defense in this case, that with regard to this particular act, which he's charged, there was an agreement to pay money. I think if he says that, the status of the victim was that of a prostitute, then it goes beyond the facts of the events of this particular evening.

So I think there is a difference between saying she's a prostitute and I picked her up as a prostitute or that she and I had an agreement for sex for money on this particular night.

BY MR. SCHNEIDER:

Well, the only difference is you're drawing — asking the jury just to disbelieve that this was just some sort of social engagement, I'm going to pay you money for sex, but in name not saying she was a prostitute. That is the issue, as far as we are concerned, with rape, and also there is a serious question in my mind.

You have a number of other individuals who may have been involved in sexual acts with the victim. They have not been charged. Mr. Eagan apparently has been singled out.

[Supp Tr. 40]

You know, that may have been a policy issue raised by you or decision made by the prosecutor's office, but I think that information is relevant. It should be brought before the jury, and it should be up to them, as the tryers of fact, to believe or disbelieve the victim's testimony, and for that reason, on the issue of her being a prostitute, I would ask that the Court not grant the State's motion in limine.

As to the issues of her being a drug addict and her being pregnant at the time of the alleged offense, this information was contained in the discovery. These are representations that were made at the hospital by the victim, and again, I think this goes to her credibility.

She said in her deposition, number one, that she was not pregnant; number two, that she was addicted to T's and blues, but she had not either shot it up or taken it within the one month prior to this. The medical evidence would indicate that there appeared to be fresh track marks on her. [Supp Tr. 41]

BY THE COURT:

Well, how does being a drug addict violate the Indiana Rape-Shield law?

BY MR. BELLA:

I'm not alleging that that violates the rape-shield law.

BY THE COURT:

Said testimony violates Indiana Rape-Shield law.

BY MR. BELLA:

Perhaps I should have put and/or is irrelevant and unduly prejudicial.

BY THE COURT:

It's certainly not irrelevant. It may be unduly prejudicial to her personally, but it's not irrelevant to the charge against

Eagan. It directly involves her ability to see and hear what she said she saw, and as far as the being pregnant, is there also going to be evidence that she was unmarried? Would the evidence of pregnancy be coupled with testimony that she is unmarried?

BY MR. BELLA:

That, I would imagine.

BY THE COURT:

Yes, no? [Supp Tr. 42]

BY MR. BELLA:

Yes, Your Honor, I would imagine.

BY MR. SCHNEIDER:

She denies being pregnant. She said that in her deposition.

BY THE COURT:

The question is is the testimony of pregnancy going to be coupled with testimony that she is unmarried?

BY MR. SCHNEIDER:

Yes, I believe so.

BY THE COURT:

Then it does violate the rape-shield law. That is not relevant to the issue as to whether or not she was raped, regardless of whether or not she's consistent on her statement that she's pregnant because that follows and falls under section one, evidence of the victim's past sexual conduct.

Opinion evidence of the defendant's past sexual conduct, well, that she is a prostitute, would be that quality of testimony that's excluded. Reputation evidence of the victim's past sexual conduct, that is excluded. The fact that the defendant negotiated sex with her at a price, however, is not excluded under any section of the Indiana Rape-Shield law, as it's written.

[Supp Tr. 43]

BY MR. BELLA:

Is the Court's ruling, then, that the defendant can go into all negotiations that night, but cannot say you are a prostitute, aren't you, something to that effect, characterize the victim as a prostitute, other than going into the events of that night?

BY THE COURT:

Well, you know, if you get sworn testimony that he negotiated with her at a price for sex, counsel will not be precluded from arguing to the jury, at the conclusion of the case, that constitutes a prostitute; that is what a prostitute does, negotiates sex for a price. He can say that in front of the jury. He may, but the law must be followed. There may not be evidence of the victim's past sexual conduct. The reason for that is that prostitutes may be raped.

Secondly, opinion evidence of the victim's past sexual conduct is precluded; I thought she was a prostitute, excluded, can't say that. Reputation evidence of the past sexual conduct; I heard from Ralph that she was a prostitute, that's excluded, not to be discussed in any way, shape or form. [Supp Tr. 44]

The fact that she's a drug addict has nothing to do with the rape-shield law. That's includable, directly bears on her ability to see, hear and relate what had happened to her, if anything.

Any clearer ruling needed?

BY MR. SCHNEIDER:

No, Your Honor.

BY MR. BELLA:

And the fact that she is pregnant is excluded?

BY THE COURT:

I didn't say that.

BY MR. BELLA:

Yes, Your Honor.

BY THE COURT:

All right, same thing.

BY MR. BELLA:

Thank you, Your Honor. [Supp Tr. 45]

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STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE SUPERIOR COURT OF LAKE COUNTY
CRIMINAL DIVISION
CROWN POINT, INDIANA

STATE OF INDIANA)
)
VS) CAUSE NO. 2CR-116-582-468
)
GARY J. EAGAN)

REPORTER'S CERTIFICATE

I, DEBRA S. BANACH, Certified Shorthand Reporter of the Superior Court of Lake County, Criminal Division, Crown Point, Indiana, do hereby certify and state that the preceding is a true, complete and correct transcript of the testimony had in connection with the MOTION TO SUPPRESS AND MOTION IN LIMINE in the above-entitled cause, as made by me from my shorthand notes, so taken at said time and place and reduced to typewriting.

WITNESS MY HAND, this 4th day of November, 1987.

DEBRA S. BANACH, C.S.R.

[Supp Tr. 46]

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE SUPERIOR COURT OF LAKE COUNTY
CRIMINAL DIVISION
CROWN POINT, INDIANA

STATE OF INDIANA)
)
VS) CAUSE NO. 2CR-116-582-468
)
GARY J. EAGAN)

JUDGE'S CERTIFICATE

I, JAMES E. LETSINGER, Judge of the Superior Court, Criminal Division, Lake County, Indiana, do hereby certify that the above and foregoing is a true, complete and correct transcript of the proceedings had in connection with the MOTION TO SUPPRESS and MOTION IN LIMINE in the above-entitled cause, including questions and answers made by the witnesses, Defense Attorney, Prosecuting Attorney and the Judge in the above-entitled cause.

WITNESS MY HAND, the 4th day of November, 1987.

JAMES E. LETSINGER,
JUDGE

[Supp Tr. 47]

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE SUPERIOR COURT OF LAKE COUNTY
CRIMINAL DIVISION
CROWN POINT, INDIANA

STATE OF INDIANA)
)
v.) CAUSE NO. 2CR-116-582-468
)
GARY J. EAGAN)

EXCERPTS FROM RECORD OF
CRIMINAL TRIAL OF
GARY J. EAGAN

TESTIMONY OF SERGEANT THOMAS BAUGHMAN

PAGES 229-233

Q. Sergeant Baughman, when you arrived at the Hammond Police Station with the defendant, Gary Eagan, what did you do then?

A. We took him into our office, read him a voluntary statement, voluntary appearance of rights, took a statement from him as to what actually took place at the lakefront.

Q. Sergeant, I'm going to show you what's been marked for purposes of identification as State's Exhibit O and ask if you can identify that, please?

A. Yes. This is the voluntary advisement of rights that was read to him and a statement that he gave at that time.

Q. And as you read those rights to Gary Eagan on the morning of the 17th, did he appear to understand the rights that you explained to him?

A. I didn't read the rights myself to him. My partner did. I was present. Sergeant Raskosky read him the voluntary rights.

Q. While you were present?

A. Yes.

Q. Did the defendant, Eagan, appear to understand the advisement of rights?

A. Yes, he did.

Q. And did you have him read through the advisement and sign it himself? [Tr. 229]

A. Yes, that's his signature.

Q. And after advising him of his rights, did you proceed to take a statement from him?

A. Correct, we did.

Q. And State's Exhibit O, is that the text of his statement?

A. Yes, it is.

Q. Did you have him sign each and every page of the statement and was his signature witnessed on each and every page of the statement?

A. Yes, it was.

Q. After taking the statement from him, Sergeant, did you give the defendant a chance to read over the statement?

A. Yes.

Q. And make any corrections or changes that he wished?

A. We did.

BY MR. BELLA:

Your Honor, I move to admit State's Exhibit O.

AT THIS POINT, DISCUSSION WAS HELD AT THE BENCH, OUT OF THE HEARING OF THE JURY, AND ON THE RECORD.

BY MR. SCHNEIDER:

For purposes of the record, I'm going to object to the introduction of State's Exhibit O on the grounds previously raised in the Motion To Suppress; namely, the statement was not freely and voluntarily given; ask it to be made a continuing objection. [Tr. 230]

BY THE COURT:

All right. The objection is overruled.

BY MR. SCHNEIDER:

Excuse me — before this is read into evidence, State's Exhibit O which is now going to be State's Exhibit 10, I previously indicated to the Court yesterday that I felt that an objectionable language, in view of the — in view of the Court's ruling on the Motion In Limine; and I would ask that the particular sentence be deleted. I do not think it is — it adds anything to this.

BY THE COURT:

What sentence?

BY MR. SCHNEIDER:

The sentence on page 2, starting: "When we got out of the car, one of the subjects walked up to me. We dropped off our nigger whore" and then that is the sentence I feel is objectionable.

BY THE COURT:

Well, State?

BY MR. BELLA:

I think the defense, to have a statement like that in a State's Exhibit isn't to object to it if the defense wishes to allege that the Motion In Limine — (inaudible at this point) State chooses to do so — [Tr. 231]

BY MR. SCHNEIDER:

Well, the victim at this point has gone back to Chicago.

BY MR. BELLA:

Also the particular sentence could very well refer to the actions of that night. There is already testimony about that.

BY THE COURT:

I agree with that.

WHEREUPON THE FOLLOWING WAS HELD BACK IN THE HEARING OF THE JURY.

BY THE COURT:

What's previously been marked as State's Exhibit O is admitted as State's Exhibit #10.

AT THIS POINT, STATE'S EXHIBIT NUMBERED 10 ADMITTED INTO EVIDENCE. [Tr. 232]

VOLUNTARY APPEARANCE; ADVICE OF RIGHTS
YOUR RIGHTS

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER

I, /s/ Gary Eagan have come to the Detective Bureau of Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers of the Hammond, Indiana Police Department, In regard to an invetigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so.

Prior to any questioning, I was furnished the above statement of my rights at 11:14 a.m. on 5-17-82 at H.P.D. by Roger Raskosky and Thomas Baughman of the Hammond Police Department. I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Signed /s/ Gary J. Eagan

11:16 A.M. 5-17-82 H.P.D.

Witness /s/ Sgt. Roger A. Raskosky

Witness _____

Okey [sic] to take your photo: /s/ Gary Eagan

Date: _____ [Tr. 233]

HAMMOND POLICE DEPARTMENT
VOLUNTARY STATEMENT

CASE # 82-14893

DATE 5-17-82
TIME _____

Statement of Gary James Eagan
First Middle Last

Questioned by Sgts. Roger Raskosky and Thomas Baughman of the Hammond Police Department.

I, Gary James Eagan, give the following free and voluntary statement to Sgts. Roger Raskosky and Thomas Baughman who have identified themselves to be officers of the Hammond Police Department. I have been advised that any statement I might voluntarily make may be used against me in a court of law.

Q. What is your true name?

A. Gary James Eagan

Q. Where do you live?

A. 13302 Baltimore Ave. 2nd Floor Apt. Chicago, Ill.

Q. With whom do you live at that address?

A. Pat Gurgel

Q. How old are you and what is the date of your birth?

A. 22 5-23-59

Q. Where are you employed? (or attend school, if student)

A. Unemployed

Q. Where were you on the evening of 5-16-82, and what were your actions?

A. I was out in Riverdale around 11:30 P.M. at a girls house my the name of Dar, and when I left there it was about 11:45 P.M. and I drove towards my apartment. When I drove by

Aguiid Gardens apartments around 132nd St. I noticed a black female standing on the corner and she waved for me to pull [Tr. 233]
over. She told me that she needed a ride and that she also needed some money and that she was hungry, so I bought her a bag of popcorn. When she got into the car and we started driving over to the South Shore area, and also we stopped and picked up two friends of mine named Milan and Mike at the corner of 105th St. and Ewing Ave. Then we went to the South Shore. We stayed there for about a half hour and had a couple of beers and then we drove over to Cal. Park. When we got to Cal Park, I dropped Milan and Mike off and then she and I drove over to a wooded area in Hammond by the Edison plant along the lake front. We parked and stayed in the car at which time she gave me some head and then we fucked. Before this she had asked me for some money, but I told her that I would take care of her later that I didn't have enough money right now. When we were finished we drove back over to Cal. park where the other people were and she got out of the car and got into a van with three other guys and left. I let them get a way

I have read this statement consisting of 2 page(s) and the facts contained therein are true and correct.

WITNESS: /s/ Sgt. Roger Raskosky /s/ Gary Eagan
Signed by the Party.
WITNESS: /s/ Sgt. Thomas Baughman Page 1 of 2 pages.

HAMMOND POLICE DEPARTMENT
VOLUNTARY STATEMENT

CASE # 82-14893

DATE 5-17-82
TIME _____

from me and then I started to follow them. They drove over to the same wooded area where we were at earlier. They drove up the road into the middle of the woods, and I drove along a cinder road between the woods and some railroad tracks. They parked on the road that they were on and I parked on the road where I could just see the van. About fortyfive minutes later the van pulled out of the woods and went back over to Cal. Park and I followed them. When we got out of the cars one of the subjects walked up to me and said "we dropped off your nigger whore." I drove over to the wooded area and looked from out of the car for her, but didn't find her. Then I drove over to my sister who lives at 102nd St. and Ave. L. It was about 3:00 A.M. and I went inside and woke her up. I told her that I think these guys might have hurt that girl and that I didn't know what to do. She said that she didn't know what to tell me. I then drove home and called the police and asked for Officer LoBianco, but I spoke to his partner. I asked them if they could come by and talk to me. They came over and I told them what I thought had happened and I rode with them over to the woods and we found her.

Q. Earlier you stated that some subjects had attacked you and had beaten you up. When and where did this happen?

[Tr. 233]

A. When I first pulled into Cal. Park, I got out of the car and the subjects in the van threw a beer bottle and hit my windshield. I walked over to them and they jumped on me and beat me with their fists.

Q. What type of clothes was she wearing when you picked her up?

A. I can't remember.

Q. Was she smoking?

A. Yes. I don't know what brand. I think she stole a pack off me.

Q. What brand of cigarettes could she have stolen off of you?

A. Either Kools or Marlboro 100's.

Q. What car were you driving that night and who does it belong to?

A. It was a Beige over beige Olds. 88 1972, and it belongs to my girlfriend whose name is Dawn Serafin.

Q. Can you explain why there was blood on the seat and driverside of that vehicle?

A. A friend of mine my the name of Jim hurt his finger about a week ago and got blood on the car.

Q. What can you tell me about Jim?

A. He's white. I don't know where he lives but he's a good friend of Pats.

Q. Would you be willing to take a polygraph test as to this statement?

A. Yes.

Q. Is the statement that you have given us the truth to the best of your knowledge?

A. Yes.

Q. Would you testify to this statement in court?

[Tr. 233]

A. Yes.

I have read this statement consisting of 2 page(s) and the facts contained therein are true and correct.

WITNESS: /s/ Sgt. Roger Raskosky /s/ Gary Eagan
Signed by the Party.
WITNESS: /s/ Sgt. Thomas Baughman Page 2 of 2 pages.

[Tr. 233]

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE SUPERIOR COURT OF LAKE COUNTY
CRIMINAL DIVISION
CROWN POINT, INDIANA

STATE OF INDIANA)
)
v.) CAUSE NO. 2CR-116-582-468
)
GARY J. EAGAN)

EXCERPTS FROM RECORD OF CRIMINAL TRIAL OF GARY J. EAGAN

TESTIMONY OF SERGEANT THOMAS BAUGHMAN

PAGES 244-247

Q. And did Mr. Eagan give you another statement?

A. Yes. he did.

Q. Sergeant, I'll show you what's been marked for purposes of identification as State's Exhibit P and ask you if you can identify that, please?

A. This is the second statement that was taken from Mr. Eagan, and this was the Waiver of his rights that was read to him at that time.

Q. And when was that second statement taken from him?

A. On the 18th at 4:21 p.m., started, and in our office.

Q. Now referring to page one of State's Exhibit P, entitled Waiver and Statement, there are five (5) enumerated rights. Did you read those rights to Mr. Eagan and explain them to him?

A. They were read to him by my partner, Sergeant Raskosky, in my presence.

Q. And did Mr. Eagan appear to understand the advisement of rights?

A. Yes, he did.

Q. And did he sign a waiver of rights?

A. Yes, he did.

Q. And was that signature witnessed by Sergeant Raskosky?

[Tr. 244]

A. Yes, it was.

Q. The following two (2) pages of the statement, is that the section of his written statement to you?

A. Yes, it is.

Q. Signed by Mr. Eagan on each and every page and witnessed on each and every page?

A. Yes, sir.

Q. And did you once again give him a chance to read over and make any corrections if he desired?

A. Yes, he had the opportunity.

BY MR. BELLA:

Move to introduce State's Exhibit P into evidence.

AT THIS POINT, DISCUSSION WAS HELD AT THE BENCH, OUT OF THE HEARING OF THE JURY, AND ON THE RECORD.

BY MR. SCHNEIDER:

I'm going to object to State's Exhibit P on the same ground as State's Exhibit O. Statement was not freely and voluntarily given, ask that this be a continuing objection.

BY THE COURT:

All right, continuing objection, but it will be admitted as ll. Anything in here about anything — anything in here that might be objectionable on other grounds?

BY MR. SCHNEIDER: [Tr. 245]

None other than might consider the language offensive.

WHEREUPON THE FOLLOWING WAS HELD BACK IN THE HEARING OF THE JURY.

AT THIS POINT, STATE'S EXHIBIT NUMBERED 11 ADMITTED INTO EVIDENCE. [Tr. 246]

WAIVER AND STATEMENT
HAMMOND POLICE DEPARTMENT

CASE # 82-14893

5-18-82 PLACE H.P.D. TIME STARTED 4:21 P.M.

I, Gary Eagan, AM 22 years old. My date of birth is 5-23-59, I live at 13302 Baltimore Ave. The person to whom I give the following voluntary statement, Sgt. Raskosky Sgt. Baughman, having identified and made himself known as a detectives of the Hammond Indiana Police Department, DULY WARNED AND ADVISED ME, AND I KNOW:

1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.

2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.

4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

5. That if I cannot hire an attorney, one will be provided for me.

WAIVER

I have read the foregoing statement of my rights and I am fully aware of the said rights. I do not desire the services of any attorney at this time and before proceeding with the making of any statement or during the course of any conversation with any police officers, and hereby waive said right. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me to procure any statement or [Tr. 247]

induce any conversation. That the statement I am about to give is the truth and that I give it of my own free will.

(Signed) s/s Gary J. Eagan

TIME 4:23 P.M. DATE 5-18-82

I have read each page of this statement and waiver, consisting of 2 pages, each page of which bears my signature, and corrections, if any, bear my initials, and certify that the facts contained herein are true and correct.

This statement was completed at 5:25 P.M., on the 18 day of May, 1982.

(Signed) s/s Gary J. Eagan

CERTIFICATION

I hereby certify that the foregoing warning and waiver was explained and read by me to the above signatory, and that he also read it and has affixed his signature hereto in my presence, and that I will so testify in court.

s/s Sgt. Roger A. Raskosky

[Tr. 247]

VOLUNTARY STATEMENT
HAMMOND POLICE DEPARTMENT

CASE # 82-14893

DATE 5-18-82
TIME 4:24 P.M.

Statement of Gary James Eagan
First Middle Last

Questioned by Sgts. R. Raskosky and T. Baughman of the Hammond Police Department.

I, Gary James Eagan give the following free and voluntary statement to Sgts. R. Raskosky and T. Baughman who have identified themselves to be officers of the Hammond Police Department. I have been advised that any statement I might voluntarily make may be used against me in a court of law.

Q. What is your true name?

A. Gary James Eagan

Q. Where do you live?

A. 13302 Baltimore Ave. 2nd Floor Chicago, Ill.

Q. With whom do you live at that address?

A. Pat Gurgel

Q. How old are you and what is the date of your birth?

A. 22 5-23-59

Q. Where are you employed? (or attend school, if student)

A. Unemployed

Q. Why are you arrested at this time?

A. Rape and Attempted Murder

Q. Tell us in your own words who was with you when you drove into the Cal. Park on 5-17-82, and what your actions were?

[Tr. 247]

A. I was driving a Old.88 along with Mike and Milan and the girl, when we pulled into Cal. Park and then we all drove over to the wooded area East of the Edison Plant on the lakefront. We then got out of the car and I removed a sheet out of the trunk and placed it on the ground. It was a stripped bedsheet. She then mentioned to me that before we did anything that I was going to have to give her some money for this. I then told her that I would take care of her later on. She then took all her clothes off, and Mike took off his clothes at which time he fucked her. He got up when he was finished and I said that I would go next, but that I was having trouble getting it up. She then called me over to her and she gave me some head. Then I fucked her. While I was fucking her she called Milan over to her so that she could give him some head while I fucked her. When I was finished then Milan fucked her. We then put our clothes back on, including her, and then we all drove back over to Cal. Park and dropped off Milan and Mike. Then me and her drove back over to the wooded area and we got out of the car. I was going to fuck her again. So she took off her clothes, and she started arguing with me, and was crying and saying I want some money right

I have read this statement consisting of 2 page(s) and the facts contained therein are true and correct.

WITNESS: /s/ Sgt. Roger Raskosky /s/ Gary Eagan

Signed by the Arrested Party.

WITNESS: s/s Sgt. Thomas Baughman Page 1 of 2 pages.

VOLUNTARY STATEMENT
HAMMOND POLICE DEPARTMENT

CASE # 82-14893

DATE 5-18-82
TIME 4:24 P.M.

now. I'm not waiting, fuck this shit. She then started wrestling with me hit me in the face. I then picked up a rock and hit her in the head with it. She then came back fighting again and we wrestled to the ground. She then pulled my knife out of the sheath that I had tucked in my pants on the left side, and I grabbed the knife from her. During this time I think that she got a cut on her right wrist. We started wrestling around again and when we rolled over she somehow got the knife shoved in her back. We kept on wrestling and I still had ahold on the knife. She then hit me in the face again either with her fist or a rock and she got stabbed again. She then fell to the ground on her back. I then jumped on top of her and we started fighting somemore and I flipped out and stabbed her several more times. She quite moving and I got parinoid and started looking for the sheath for my knife. I found the sheath and then I went to the car and got a rag and wiped everything off. I then got into the car and drove over to the Edison Plant. I got out of the car and walked out onto the pier and threw the knife, sheath and rag into the lake. I then got back into the car and drove over to my sisters. I woke my sister up and told her about the fight and that I had stabbed some chick and asked her what I should do. She told me that she didn't know what to tell me that I had better get my act together and straighten out my life. I then drove back to my apartment and called the Chicago Police.

Q. When you called the police what did you tell the Officer what condition you believed the girl was in?

A. I told him that she was in bad shape and that she could possibly be dead.

Q. When you went with the chicago squad did you take them directly to where the body was at?

A. I took them to approximately the area and we had to look for her with a flashlight.

Q. When you walked into the wooded area to have sex the second time did you go to the same spot as the first time?

A. Yea.

Q. Is this the same spot where the fight ended?

A. No. We were fighting all over out there.

Q. Did anyone else hit or stab her the time that the two of you were fighting?

A. No, there was no one else there.

Q. When you and Mike and Milan had sex with her the first time did anyone threaten her?

A. No.

Q. Do you know where Mike or Milan live at and how long have you know them?

A. No I don't know where they live. I've known them for about a year.

Q. Is the statement that you have given us the truth to the best of your knowledge?

A. Yes.

Q. Will you testify to this statement in court?

A. Yea.

I have read this statement consisting of 2 page(s) and the facts contained therein are true and correct.

WITNESS: /s/ Sgt. Roger Raskosky /s/ Gary Eagan
Signed by the Arrested Party.

WITNESS: s/s Sgt. Thomas Baughman Page 2 of 2 pages.

[Tr. 247]

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE SUPERIOR COURT OF LAKE COUNTY
CRIMINAL DIVISION
CROWN POINT, INDIANA

STATE OF INDIANA)
)
v.) CAUSE NO. 2CR-116-582-468
)
GARY J. EAGAN)

EXCERPTS FROM RECORD OF CRIMINAL TRIAL OF GARY J. EAGAN

TESTIMONY OF SERGEANT THOMAS BAUGHMAN

PAGES 261-263

. . . Either of the times you talked to Gary Eagan specifically the first time, May 17th, 1982, you say he was not a suspect at that point?

A. At that point, no sir.

Q. He had indicated that he wanted to file a battery report with the Hammond Police Department?

A. That was earlier in the morning.

Q. That was earlier in the morning. When you talked to him May 17th, how did his — how did he appear to you?

A. When I saw him May 17th?

Q. May 17th.

A. The first time I saw him was in the morning at the lakefront.

Q. What was his speech like when you first saw him that morning?

A. Speech didn't seem bad to me, to me it didn't.

Q. All right. What — how did his eyes appear?

A. I don't know. I don't recall. I didn't pay attention to his eyes, sir.

Q. So you don't remember if they were glassy?

A. They could have been.

Q. They could have been, but you're not sure?

A. Correct.

Q. Between the Robertsdale Station and the main station on Hohman, not Hohman, Calumet Avenue, was Gary Eagan handcuffed? [Tr. 261]

A. No, sir.

Q. Prior to taking of the first statement, were any promises, threats, or inducements made by you or Officer Raskosky?

A. No, sir.

Q. And basically, it was a question and answer type of procedure that you followed when you questioned any of the witnesses, is that correct?

A. That's correct.

Q. Okay. During the intervening or the next approximately thirty (30) hours, this is when you did some follow-up investigation, is that correct?

A. That's correct, sir.

Q. And you took the second statement the late afternoon hours of — right now I'm referring to the second statement of Gary Eagan and not — okay. Second statement of Gary Eagan, this would have been the afternoon hours of May 18th, is that correct?

A. Yes, sir.

Q. All right. When you — okay. Where was Mr. Eagan being held?

A. At the Hammond Police Station.

Q. In the basement lock-up area.

A. In our record lock-up area, yes, sir. [Tr. 262]

Q. Okay. And where did you and Officer Raskosky question him?

A. In our office.

Q. Which is also in the basement?

A. That's all we have.

Q. That's all you have in Hammond?

A. Hammond, one floor, we're on.

Q. All right. Do you recall if you told him that you had talked to the victim or if you had talked to Officer LoBianco?

A. I don't recall right now, sir. I may have.

Q. You could have?

A. I could have, yes sir, but I don't recall.

Q. Could you have said well — I've talked to the victim. I've talked to Officer LoBianco. This is what they've said, do you want to give a statement now?

A. Could have.

Q. Again no promises, threats or inducements were made at this time.

A. No, sir.

Q. That's not standard operating procedure at the Hammond Police Department?

A. No, sir. [Tr. 263]

No. 88-317

IN THE

Supreme Court of the United States

October Term, 1988

JACK R. DUCKWORTH, *Petitioner*,

v.

GARY JAMES EAGAN, *Respondent*,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

Whether the Seventh Circuit's formalistic and hyper-technical application of *Miranda*, prohibiting the use of objectionable "magic words" in an advice of rights, is in conflict with the decisions of this Court and a majority of Circuits which have determined this issue.

Whether the Seventh Circuit's determination that an incriminating statement, following a constitutionally adequate *Miranda* warning, was tainted and inadmissible by reason of the first advice of rights, is in conflict with the decisions of this Court and a majority of Circuits which have determined this issue.

LIST OF PARTIES

The parties to this proceeding are Petitioner Jack R. Duckworth, Superintendent, Indiana State Prison, Michigan City, Indiana and Respondent, Gary James Eagan.

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TABLE OF AUTHORITIES

No. 88-317

IN THE

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JACK R. DUCKWORTH, *Petitioner*,

v.

GARY JAMES EAGAN, *Respondent*,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

Petitioner, Jack R. Duckworth, respectfully prays the Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter the "Seventh Circuit" which reversed and remanded this cause to the United States District Court for the Northern District of Indiana, South Bend Division (hereafter the "District Court").

OPINIONS BELOW

The decision of the Seventh Circuit denying Petitioner's request for Rehearing in Banc issued on May 24, 1988. (J.A.1) The decision of the Seventh Circuit reversing and remanding this cause to the District Court issued on March 23, 1988. *Eagan v. Duckworth*, 843 F.2d 1554 (7th Cir. 1988). (J.A.3) The decision of the District Court was entered on June 26, 1986. (J.A.49)

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 17 of this Court. The decision of the Seventh Circuit was entered on March 22, 1988. This decision was reviewed on May 24, 1988, when the Seventh Circuit denied Petitioner's Petition for Rehearing in Banc. A Petition for Writ of Certiorari was timely filed in that it was filed on August 22, 1988, prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c) and Rules 20.2, Rules of the Supreme Court of the United States, as measured from the issuance of the denial of Petitioner's Petition for Rehearing in Banc as provided by Rules 20.4, Rules of the Supreme Court of the United States. The Petition for Writ of Certiorari was granted on October 11, 1988 and this brief is timely filed in that it is filed prior to the due date set by the Clerk of the Court pursuant to Petitioner's request for extension of time allowed by Rule 35.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

(emphasis added.)

28 U.S.C. § 2241(c) provides in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless --

> (3) he is in custody in violation of the Constitution or laws or treaties of the United States; or . . .

28 U.S.C. § 2254(d) provides in pertinent part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . .

STATEMENT OF THE CASE

A. Nature Of The Case

The Respondent, Gary James Eagan, (hereafter "Eagan") is currently incarcerated at the Indiana State Prison, Michigan City, Indiana, and has been so incarcerated at all times while this matter was before the Courts. Eagan filed a petition for writ of habeas corpus in District Court pursuant to 28 U.S.C. § 2254. There were two primary issues raised in Eagan's petition. First, whether his right to be free of self-incrimination was impinged upon. Second, whether he was denied due process by the Court's failure to fully instruct the jury.

Eagan complained that his two statements to the police which were admitted at trial were obtained in a constitutionally infirm manner. Specifically, Eagan contends the advice of rights on the waivers was inadequate and misleading. Only this issue is raised in this petition, as the Circuit Court's decision to reverse and remand rested on this issue alone.

B. Course Of Proceedings

On December 7, 1982, Eagan was convicted, by a jury, of attempted murder and sentenced to a term of imprisonment of thirty-five (35) years. This conviction was upheld by the Supreme Court of Indiana in a decision entered August 2, 1985. *Eagan v. State*, 480 N.E.2d 946 (Ind. 1985). (J.A.-82) Eagan

filed his petition for writ of habeas corpus with the District Court on February 3, 1986. A Return to Order to Show Cause was filed by Petitioner on March 6, 1986. Eagan's petition was denied by Order of the District Court on June 26, 1986.

A Notice of Appeal was filed by Eagan, and on July 14, 1986, the District Court issued a Certificate of Probable Cause. A motion for appointment of counsel was filed by Eagan and counsel appointed by Order of the Circuit Court on December 17, 1986. Eagan's Court-Appointed Counsel filed his brief on or about February 19, 1986. Petitioner's brief was filed on March 30, 1987. On June 2, 1987, oral argument was held.

The Circuit Court's decision reversing and remanding the decision of the District Court was entered March 22, 1988. Petitioner moved for a Rehearing in Banc on April 1, 1988. Eagan's response to the motion for rehearing in Banc was filed on or about April 19, 1988. On May 24, 1988, the Circuit Court entered the Order denying Petitioner's motion for Rehearing in Banc. On August 22, 1988, Petitioner timely filed his Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, which was granted by this Court on October 11, 1988. The appeal results.

C. Facts

On May 16, 1982, Eagan telephoned the Chicago police and talked to an officer with whom he was acquainted. The officer met Eagan at his apartment and Eagan told him that he had found a naked dead woman along the shore of Lake Michigan in Indiana. Eagan led the police to the area where the body was found.

Upon approaching the victim it was apparent she was not dead. The victim, seeing Eagan, exclaimed: "Why did you stab me?" At trial the victim stated she was picked up by Eagan and some companions in South Chicago, Illinois and taken to the beach area where she had sexual relations with several of the men. Later, the victim refused to have sex with Eagan, who then stabbed her nine times and left her lying naked in the wooded area near the lake.

As the incident occurred in Indiana the matter was turned over to the Hammond Police Department (Indiana) and at approximately 11:14 a.m. on May 17, 1982, Eagan was questioned by them as a witness. Eagan was read aloud and then asked to read and sign the following advice of rights and waiver form prior to the questioning:

"VOLUNTARY APPEARANCE;
ADVICE OF RIGHTS
YOUR RIGHTS

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER

I, [Gary Eagan] have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers of the Hammond, Indiana Police Department, In [sic] regard to an investigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so.

Prior to any questioning, I was furnished the above statement of my rights at [11:14 a.m.] on [5-17-82] at [H.P.D.] by (time) (date) (place) [ROGER RASKOSKY & THOMAS BAUGHMAN] of the Hammond Police Department. I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been

made to me and no pressure of any kind has been used against me.

Signed [Gary J. Eagan]

[11:16 a.m. 5/17/82 H.P.D.]
(time) (date) (place)

Witness [Sgt. Roger A. Raskosky]

Witness _____

Okey [sic] to take your photo: [Gary Eagan]

Date _____ Time _____" (J.A. 132)

Following this advice of rights, Eagan gave the police an exculpatory statement consistent with the original story Eagan told the Chicago Police the night before.

Eagan remained in police custody and was questioned again twenty-nine (29) hours later at 4:21 p.m. on May 18, 1982. He was orally advised of and asked to read and sign the following advice of rights and waiver.

"WAIVER AND STATEMENT
HAMMOND POLICE DEPARTMENT

CASE # [82-14893]

DATE [5-18-82] PLACE [H.P.] TIME STARTED [4:21 P.M.]

I, [Gary Eagan], AM [22] years old. My date of birth is [5-23-59], I live at [13302 BALTIMORE AVENUE]. This person to whom I give the following voluntary statement, [SGT. RASKOSKY] [BAUGHMAN], having identified and made himself known as a [DETECTIVES] of the Hammond Indiana Police Department, DULY WARNED AND ADVISED ME, AND I KNOW:

1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.

2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout

the course of any conversation with any police officer if I so choose.

3. That I can stop and request an attorney at any time during the course of the taking of any statements or during the course of any such conversation.

4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

5. That if I cannot hire an attorney, one will be provided for me.

WAIVER

I have read the foregoing statement of my rights and I am fully aware of the said rights. I do not desire the services of any attorney at this time and before proceeding with the making of any statement or during the course of any conversation with any police officers, and hereby waive said right. No promises or threats have been used against me to procure any statement or induce any conversation. That the statement I am about to give is the truth and that I give it of my own free will.

(Signed) [Gary J. Eagan]

TIME [4:23 p.m.] DATE [5-18-82]

I have read each page of this statement and waiver, consisting of [2] pages, each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at [5:25 PM], on the [18] day of [May], 19[82].

(Signed) [Gary J. Eagan]

CERTIFICATION

I hereby certify that the foregoing warning and waiver was explained and read by me to the above signatory, and that he also read it and has affixed his signature hereto in my presence, and that I will so testify in court. (J.A. 143-144)

[Sgt. Roger A. Raskosky]"

Eagan then gave the police an inculpatory statement. The following day, May 19, 1988, Eagan led the police to the scene of the crime and directed the police to the location of the weapon, a knife, and the victim's clothing, which was promptly recovered. Prior to trial Eagan filed a motion to suppress the evidence obtained on May 17, 18 and 19. A hearing was conducted and Eagan's motion was denied. (J.A. 95)At trial, both Eagan's statements and the clothing and weapon were admitted into evidence over his objection.

SUMMARY OF THE ARGUMENT

The Seventh Circuit has determined that certain language contained in the waiver of rights at issue is a *per se* violation of *Miranda*. In essence, the decision of the Seventh Circuit is contrary to the spirit and the letter of the law set out in *Miranda* which specifically counsels against any requirement of "magic words" to satisfy *Miranda*. Further, the position taken by the Seventh Circuit on the specific language complained of is contrary to the majority of circuits which have reviewed this language.

I. THE SEVENTH CIRCUIT'S DETERMINATION THAT EAGAN'S CONFESSIONS WERE NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY GIVEN IS IN CONFLICT WITH DETERMINATIONS OF THE U.S. SUPREME COURT AND A MAJORITY OF THE CIRCUIT COURTS ON THIS ISSUE

Respondent's position on this issue can be stated no better than was done by Judge Coffey in his dissent to the majority decision in this cause.

> After researching and reviewing our colleague's decisions, it is clear that defendants' purely semantical and hyper-technical challenges to the sufficiency of a particular *Miranda* warning have been convincingly rejected by the Fifth, Second, Fourth, Eighth, Tenth and Eleventh Circuits.

* * *

> Today, the majority rejects and disregards the great weight of authority, leaving our circuit standing alone and thus in conflict with the vast majority of other circuits, and instead resurrects *Twomey's* "overly technical application of the *Miranda* rule". *Id.* at 1253 (Pell, J., dissenting). In so doing, the majority commits a regrettable mistake. (J.A. 27-28)

The Seventh Circuit determined the decisions of the state court and District Court, that Eagan's statements were knowingly and voluntarily given, were in error. The majority of the Seventh Circuit determined the first statement was inadmissible because the first warning was constitutionally defective. Specifically, the Seventh Circuit found the following language in the first warning constitutionally defective:

> "You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*" (J.A. 5)

According to the Seventh Circuit this language is ambiguous and misleading and presumptively invalid in view of the holding in *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972). The majority went on to conclude the first defective warning possibly tainted the second, rendering the subsequent confession and evidence obtained thereby fruit of the poisonous tree and equally inadmissible.

The decision of the Seventh Circuit is in error for three reasons. First, the decision ignores the current trend of decisions of the Supreme Court in this area of law. Second, the decision is inconsistent with the reasoning employed by the Seventh Circuit in other decisions of this issue. Finally, this decision contradicts the decisions of a majority of the other Circuit Courts.

The recent decisions of this court discussing Miranda[1] dis-

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[1] *Colorado v. Connelly*, 479 U.S. 157 S.Ct. 515, 93 L.Ed.2d 473 (1987); *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987); *Connecticut v. Barnett*, 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987).

play a noticeable trend away from overly simplistic reliance upon the use of "magic words" to inform a defendant of his rights. This Court has recently re-emphasized the principle that the totality of the circumstances must be reviewed in determining the validity of any particular confession. In *Connecticut v. Barret*, 479 U.S. 523, 107 S.Ct. 828, 832 (1987), the Court stated:

> "Nothing in our decisions, however, or in the rationale of Miranda, require authorities to ignore the *tenor* or *sense* of a defendant's response to these warnings." (emphasis added).

In *Twomey*, the Seventh Circuit discussed no other facts beyond that of the language of the advice of rights alone. *Twomey* establishes in effect a set of "magic words" presumptively invalid in all cases or situations. The Seventh Circuit while discussing the "totality of the circumstances" standard has nonetheless applied a "per se violation" approach resting upon the use of specific "magic words" the Seventh Circuit has found objectionable.

> Although over fifteen years have passed since this court rendered *Twomey*, it remains the "seminal case in this circuit dealing with the issue of ambiguously worded *Miranda* warnings," *Emler v. Duckworth*, 549 F.Supp. 379, 381 (N.D. Indiana, 1982). We see no reason to stray from its teachings now. The "internal inconsistent[cies]", *United States ex rel. Placek v. State of Illinois*, 546 F.2d 1298, 1300 (7th Cir. 1976), inherent in this type of warning are no less ambiguous and misleading today than they were fifteen years ago. (J.A. 7-8)

The Seventh Circuit's objection to the language of the advice of rights in this case is also incompatible with other recent decisions of the Seventh Circuit and a majority of the other circuits which have addressed the issue. In *Richardson v. Duckworth*, 834 F.2d 1366 (7th Cir. 1987) the Circuit Court stated, rightly so, with respect to the formulation of the Miranda warning itself, the Supreme Court has . . . adopted a flexible analysis, "and has never mandated that law, enforcement officers use certain 'magic words' to inform a defendant of his rights." *Id.* at 1370. In *United States v. Johnson*, 426 F.2d 1112 at 1115-1116, (7th Cir. 1970) *cert. denied* 400 U.S. 842 (1970) the Court held:

> "Harry Johnson was told that a lawyer would be appointed '*if and when you go to court*' and claims this did not fully advise him of his right to have an attorney present during the custodial interrogation. However, he signed a statement which, *read as a whole, complied with the Miranda requirements*. Having signed the written waiver form, without evidence to the contrary, he cannot now contend that he did not understand his rights. *See, Bell v. United States*, 382 F.2d 985, 987 (9th Cir. 1969), *cert. denied*, 390 U.S. 965, 88 S.Ct. 1070, 19 L.Ed.2d 1165 (1968). (emphasis added)

Nonetheless, in this case the Seventh Circuit reaffirmed its decision in *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972) applying *Twomey's* unrealistic and hypertechnical application of Miranda, objecting to the same language approved in *Johnson*, *supra*.

Such a formalistic application of Miranda has been rejected by a majority of the Circuits addressing the issue. The Second Circuit reviewed language similar to that contained in the advice of rights rejected by the Seventh Circuit in this cause in *Massimo v. United States*, 463 F.2d 1171 at 1173 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973):

> (c) You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
>
> (d) You have the same right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of furnishing you a lawyer but one will be appointed for you, if you wish, if and when you go to court.* (emphasis in original)

The Second Circuit found this language constitutionally sufficient in view of the advice of rights as a whole. The Fourth

Circuit reviewed language indistinguisable in content in *Wright v. North Carolina*, 483 F.2d 405, 410 (4th Cir. 1973), *cert. denied*, 413 U.S. 936 (1974) and also found it constitutionally adequate:

> You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to Court.* (emphasis added)

In *United States v. Lacy*, 446 F.2d 511 at 512-513 (5th Cir. 1971) the Fifth Circuit also reviewed similar language and held it to be a constitutionally sufficient advice of rights:

> You have the right to talk to a lawyer for advice *before* we ask you any questions, and to have him with you during the questioning. You have this right to the advice and *presence* of a lawyer, even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* (emphasis in original)

So, too, the Eighth Circuit has reviewed and upheld similar language to that objected to by the Seventh Circuit:

> You can stop the questioning anytime. It means that you have the right to have an attorney present with you at this time; and it means that if you do say anything, that it can be used against you later; and *that you do have the right to have an attorney appointed by the Court for you if you are later charged with a Federal offense.* (emphasis in original)

Klingler v. United States, 409 F.2d 299, 308 (8th Cir. 1969), *cert. denied* 396 U.S. 899 (1969).

The Tenth Circuit in *Coyote v. United States*, 380 F.2d 305 (10th Cir. 1967) *cert. denied*, 389 U.S. 992 (1967), addressed this issue and concluded quite accurately:

> "Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. *We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. The crucial test is whether the words in the contest used*, considering the age, background and intelligence of the individual being interrogated, *impart a clear, understandable warning of all of his rights." Id.* at 308. (emphasis added)

The Eleventh Circuit has also rejected the position taken by the Seventh Circuit in *United States v. Contreras*, 667 F.2d 976, 978 (11th Cir. 1982), *cert. denied* 459 U.S. 849 (1982), reviewing the following language:

> "You have the right to consult your attorney before making any statement or answering any question, and you can have your attorney present while we interrogate you.
>
> If you want an attorney but cannot pay for one on your own, the United States Magistrate in this city or in the Federal Court will assign you an attorney free of charge."

Thus, as Judge Coffey so aptly stated in his dissent to the majority's decision in this cause:

> [A]fter researching and reviewing our colleagues' decisions, it is clear that Defendants' purely semantical and hyper-technical challenges to the sufficiency of a particular *Miranda* warning have been convincingly rejected by the Fifth, Second, Fourth, Eighth, Tenth and Eleventh Circuits. (J.A. 27)

The great weight of authority on this issue would therefore militate in favor of upholding the admissibility ~~of the~~ first statement given by Eagan. If the Seventh Circuit's anachronstic approach to the first statement were not bad enough, the error is compounded by their conclusion the second advice of rights was possibly tainted by the first requiring an evidentiary hearing into the admissibility of the second statement.

II. THE SEVENTH CIRCUIT ERRED IN DETERMINING THAT EAGAN'S SECOND STATEMENT WAS TAINTED BY AN INADEQUATE ADVISEMENT OF RIGHTS PRIOR TO HIS FIRST STATEMENT

The second advice of rights read out loud to Eagan, than read and signed by him, contains no constitutionally objectionable language, even by Seventh Circuit standards. However, the Seventh Circuit held:

> As a result of the first warning, Eagan arguable believed that he could not secure a lawyer during interrogation. The second warning did not explicitly correct this misinformation. (J.A. 9).

Even assuming *arguendo* the first statement of Eagan was the product of a constitutionally infirm advice of rights, a point not conceded by Petitioner, the Seventh Circuit has ignored the proper standard to be applied to such circumstances. When the totality of the circumstances are reviewed it becomes obvious the second statement is admissible regardless of the Seventh Circuit's determination as to the admissibility of the first statement.

The applicable standard was most recently set out in *Oregon v. Elstad*, 470 U.S. 298 at 318 (1985):

> "Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, thought technically in violation of *Miranda*, was voluntary. *The relevant inquiry is whether, in fact, the second statement was also voluntarily made.*" (emphasis added)

The findings of state courts as to the voluntariness of confessions are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d); *Perri v. Director, Department of Correction of Illinois*, 817 F.2d 448 (7th Cir. 1987). This is true even where no express finding is made by the state court so long as such a finding is "implicit in a state court's opinion." *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217 (7th Cir. 1987).

The Seventh Circuit, out of hand, observes "of course, we know very little about the factual circumstances surrounding those events [leading to Eagan's second statement] because the state courts did not directly examine the issue" (J.A. 9). This observation is quite simply incorrect. The record of the November 19, 1982, pre-trial suppression hearing, submitted as a supplement to the record at the Circuit Court's request, contains a thorough discussion of the factual circumstance surrounding the second statement. At the suppression hearing there was ample testimony by Officer Raskosky and Baughman, Eagan's interrogators, as to Eagan's behavior and physical appearance, the advice of rights, Eagan's responses and his conduct during questioning. The passage of twenty-nine hours between statements was also established. Eagan also testified as to his perception of the events. After hearing the above described testimony, the state trial judge denied Eagan's motion to suppress as to both statements. Implicit in this denial of the motion to suppress was the necessary finding that Eagan had voluntarily and knowingly waived his Miranda rights at both opportunities. The trial court's determination was upheld on appeal and again by the District Court in denying Eagan's petition for writ of habeas corpus.

Given this set of facts, the Seventh Circuit was under an obligation to refrain from substituting "its own judgment as to the credibility of witnesses' for that of the state courts", *Richardson v. Duckworth*, 834 F.2d 1366, at 1372 (7th Cir. 1987). A careful review of the record with an eye toward the "totality of the circumstances" can render only one conclusion, that Eagan voluntarily and knowingly waived his rights at the time of the second statement. The second inculpatory statement at the very least was admissible, as was the physical evidence obtained therefrom. The Seventh Circuit's mandate reversing and remanding this case for further evidentiary inquiry is unnecessary and an inefficient exercise of judicial resources.

CONCLUSION

The Seventh Circuit erred in determining the first, exculpatory, statement given by Eagan was the product of a constitutionally inadequate advice of rights. Their determination is in conflict with a majority of Circuit Courts which have reviewed the issue as well as the current standards of the United States Supreme Court. Further, the Seventh Circuit's decision that Eagan's second, inculpatory, statement was tainted by the first allegedly inadequate warning of rights is in conflict with the recent decisions of the Supreme Court. Wherefore, Petitioner respectfully prays the Court reverse the decision of the United States Court of Appeals for the Seventh Circuit, and reinstate the judgment of the United States District Court for the Northern District of Indiana, South Bend Division.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Following this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), did the state trial court properly admit in evidence the first statement obtained from Respondent after law enforcement authorities informed him, that although he had the right to counsel prior to the custodial interrogation: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court"?

2. Did the Court of Appeals properly remand this case to the District Court for determination of whether Respondent's second statement was obtained after a voluntary waiver of his right to counsel when there is no record of the state court suppression hearing properly before the Court and when the second warnings were themselves inadequate and failed to correct the statement in the first warnings that counsel would only be provided if Respondent's case went to court?

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STATEMENT OF THE CASE

In the late night hours of May 16, 1982 the Respondent, Gary James Eagan, telephoned the Chicago Police Department to report that he had seen a dead nude woman (SCR[1] 205). Respondent took the Chicago police to a wooded area near Lake Michigan just over the Illinois state line in Indiana. There the police found a young woman shouting for assistance. As the police assisted the woman, they heard her ask Respondent: "Why did you stab me?" (SCR 207).

Respondent informed police that he had been attacked earlier in the evening by several persons who later abducted the young woman (SCR 163-164, 227). When the Hammond, Indiana police arrived they requested that Respondent go with them to the Robertsdale Station (J.A. 103) at which time the officers noticed what appeared to be dried blood on the outside of the Respondent's automobile. Respondent indicated that the blood was the result of a friend's cut hand (SCR 165). Respondent gave the police permission to take samples of the blood from his car (SCR 166, 228). The police determined that there were discrepancies in Respondent's story which included observations that would have been physically impossible for Respondent to make (SCR 176). At that point Respondent appeared distraught, tired, and glassy eyed (J.A. 100). The Hammond police asked Respondent to waive his constitutional rights and provide a statement. The specific waiver of rights, which Respondent signed, read as follows (J.A. 133):

YOUR RIGHTS

Before we ask you any questions, you must understand your rights. You have the right to remain

[1] State Court Record

> silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer (emphasis added).

In this initial statement (SCR 236-239; J.A. 134-137), given at 11:16 a.m. on May 17, 1982, Respondent indicated that he picked up the young woman in Chicago and drove around until they went to the wooded area where they engaged in sexual relations. They then drove to "Cal Park" where the woman got into a van with several men. When the van returned, the woman was not present, so Respondent went to the wooded area but was unable to find her. Respondent then called the Chicago police. Respondent further indicated in the statement that the blood on the seat of the driver's side of the vehicle came from a friend named "Jim" who had cut his finger the week before.

The police believed that this statement was not consistent with the physical terrain of the area (SCR 241). Respondent was held overnight in custody "for probable cause" (J.A. 103). After the police interviewed the victim in the hospital, they again interviewed Respondent. This interview took place at 4:21 p.m. on May 18, 1982, approximately 29 hours after the initial statement. Before giving this statement, Respondent signed a waiver from (J.A. 141-142) which included the following description of rights:

> 1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.
>
> 5. That if I cannot hire an attorney, one will be provided for me.

After signing the waiver, Respondent gave a statement in which he indicated (SCR 250-254) that he, two friends, and the woman went to the area near the beach. Each of the men had sexual relations with the woman, but a struggle ensued when the woman requested payment in return for sex. Respondent admitted hitting the woman on the head with a brick and then stabbing her (SCR 252-253). After giving this statement, Respondent returned to the crime scene with the police and assisted them in finding a knife, sheath, towel, and rag (SCR 255-256).

On May 19, 1982 an information was filed in the Superior Court of Lake County, Indiana charging Respondent with rape and attempted murder. Following the denial of Respondent's motion to suppress evidence (SCR 38-39), the case was tried to a jury in that court. In addition to the introduction of Respondent's statements, the primary evi-

dence against him was the testimony of the victim, Kay Sandra Williams. Ms. Williams testified that Respondent and two other men forced her to engage in sexual relations (SCR 116). The prosecutrix identified Respondent as the person who then hit her with a brick and stabbed her (SCR 117-118).

The primary witness called by Respondent was his sister who indicated that shortly after the stabbing Respondent arrived at her home. Respondent told her that he had taken drugs and had drunk whiskey and that "they were all stoned to begin with" (SCR 309). Respondent appeared to be "wrecked" and "hyperactive" (SCR 311). The Respondent did not testify at trial.

Based on this evidence, the jury found Respondent not guilty of rape, but guilty of attempted murder (SCR 78-79). Upon conviction, Respondent was sentenced to 35 years imprisonment.

The Indiana Supreme Court affirmed Respondent's conviction, *Eagan* v. *State*, 480 N.E.2d 946 (Ind. 1985), Justice De Bruler, dissenting (J.A. 82-94). On February 6, 1986 Respondent commenced this habeas corpus action in the United States District Court for the Northern District of Indiana pursuant to 28 U.S.C. § 2254 (J.A. 64-81). Respondent asserted that his federal constitutional rights were violated by the admission of the statements. The District Court, Hon. Allen Sharp, Chief Judge, presiding, denied the writ on June 26, 1986 (J.A. 49-53), but issued a Certificate of Probable Cause on July 14, 1986.

Respondent appealed to the United States Court of Appeals for the Seventh Circuit, and that Court appointed counsel. On March 22, 1988 a divided panel of the Seventh Circuit reversed the order of the District Court (J.A. 3-48). The majority, following the Seventh

Circuit's earlier decisions in *United States ex rel. Williams* v. *Twomey*, 467 F.2d 1248 (7th Cir. 1972) and *United States ex rel. Placek* v. *Illinois*, 546 F.2d 1298 (7th Cir. 1976), concluded that the words used in the first *Miranda* warning suggest "erroneously that only those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait. This language further implies that if the accused does not 'go to court,' i.e. the government does not file charges, the accused is not entitled to an attorney at all," (J.A. 8). The Court remanded the case for a determination of whether Respondent's second statement was made after a knowing and voluntary waiver of his constitutional rights, as the *Miranda* warnings afforded Respondent prior to his second statement did not explicitly correct the misinformation in the first admonitions, *Eagan* v. *Duckworth*, 843 F.2d 1554 (7th Cir. 1988).

On May 24, 1988 the Seventh Circuit denied the Warden's Petition for Rehearing *En Banc*, four judges dissenting (J.A. 1-2). The Warden then filed this certiorari petition which was granted by the Court on October 11, 1988, 109 S.Ct. 218. On October 31, 1988 the Court appointed the undersigned attorney to represent Respondent before this Court, 109 S.Ct. 301.

Respondent remains confined at the Indiana State Prison, Michigan City, serving this sentence.

Other facts necessary to a determination of this case will be stated in the body of this Brief.

SUMMARY OF ARGUMENT

1. A. The United States, as *Amicus Curiae*, suggests that Respondent was not "in custody" at the time of

his first interrogation. As this issue has not been raised by the State in any previous court and was not raised in the certiorari petition, the "custody" question is not properly before the Court. Nevertheless, the facts here show that Eagan was in custody at the time of his first interrogation.

B. 1. This Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) requires that an indigent suspect be informed of his right to consult with assigned counsel before and during a custodial interrogation. Here the warnings given Respondent prior to his first statement violated *Miranda* because he was informed that he could only have provided counsel if his case ultimately went to court.

2. a. The *Miranda* warnings given Eagan prior to his first statement indicated that he had the right to appointed counsel "if and when you go to court." Lower courts have disagreed on the propriety of the "if and when" warnings, with most courts holding these specific warnings improper because they state that counsel can not be provided at the time of the interrogation. Courts have found the "if and when" warnings "pretzel-like," ambiguous, and contradictory. Those courts which have upheld these warnings have seriously overestimated the intellectual sophistication and comprehension of the average suspect, when empirical data demonstrate that many suspects do not understand correct *Miranda* warnings.

b. This Court's decision in *California* v. *Prysock*, 453 U.S. 355 (1981) (*per curiam*) stands for the proposition that a *Miranda* warning which links the right to appointed counsel to a future point after the interrogation is invalid. Here the warnings given Eagan prior to his first statement did exactly that—linked his right to free counsel to a point after the interrogation, his appearance in

court. Analysis of the cases cited with approval in *Prysock* and cases interpreting this Court's decision all indicate that the "if and when you go to court" admonitions violate *Miranda*.

C. It is entirely proper under *Miranda* for a jurisdiction to require a court to appoint counsel to represent a suspect at a custodial interrogation. Other states have adopted various procedures to supply counsel at custodial interrogations. These procedures include requiring law enforcement authorities to contact the court or public defender, allowing the suspect to make direct contact with a public defender, and establishing lists of private attorneys willing to represent indigent suspects at custodial interrogations. The problem here is that the State of Indiana has adopted *none* of these procedures and does not provide for the assignment of counsel prior to court appearance by any method. This then results in police telling suspects that although they have the right to consult with counsel before and during the interrogation "[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." This statement, even if it correctly reflects Indiana law, denies a suspect his right to have an attorney at the time of the questioning, before court appearance.

II. A. The only relief granted Respondent by the Court of Appeals was to remand this case to the District Court with directions to determine whether Eagan's second statement was made after a knowing and understanding waiver of his right to counsel. This relief is appropriate because the transcript of the suppression hearing, which is now apparently available, was not prepared until months after the oral argument in the Seventh Circuit. This transcript was never considered by the Indiana Supreme Court or the District Court and was not made

part of the record on appeal in the Seventh Circuit. Remand is appropriate so the District Court can consider this transcript in conjunction with all other evidence regarding the facts and circumstances of the second confession.

B. The second warnings given Respondent also failed to comply with *Miranda* as they informed him that he had "the right to consult with an attorney *of my own choice* before saying anything." Although later in the same warnings Respondent was informed that if he "cannot hire an attorney, one will be provided" for him, the structure and content of admonitions do not clearly inform a suspect of his right to assigned counsel before and during the questioning.

C. This case is distinguishable from *Oregon* v. *Elstad*, 470 U.S. 298 (1985) because here the second warnings were not complete, clear, or comprehensive. In addition, when one considers the two sets of warnings given to Respondent 29 hours apart, it is obvious that Eagan was never properly informed of his right to have counsel at the interrogation. He was first told he could not have appointed counsel at the interrogation, and the second instructions, themselves ambiguous, failed to correct the misstatement regarding the right.

Under all of the circumstances of this case the modest relief granted by the Seventh Circuit, remand to the District Court, should be affirmed.

ARGUMENT

I RESPONDENT'S FIRST STATEMENT WAS INADMISSIBLE BECAUSE IT WAS OBTAINED AFTER HE WAS GIVEN A DEFECTIVE *MIRANDA* WARNING WHICH CONDITIONED HIS RIGHT TO COUNSEL ON APPEARANCE IN COURT.

A. The Question Of Whether Respondent Was "In Custody" At The Time Of His First Statement Is Not Properly Before The Court And, In Any Event, Respondent Was "In Custody" Within The Meaning Of *Miranda* When He Gave The First Statement.

1. The "Custody" Question Is Not Properly Before The Court.

At footnote 7 appearing at pages 10 and 11 of his *Amicus* Brief, the Solicitor General suggests that Eagan was not "in custody" at the time he gave his first statement, and thus the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) do not apply at all. The question of custody has never been raised by the State of Indiana in any court, state or federal, and thus this issue should not be considered by this Court, *E.E.O.C.* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Normal practice . . . is to refrain from addressing issues not raised in the court of appeals."); *Miree* v. *DeKalb County*, 433 U.S. 25, 34 (1977), even though such issue is raised by *amicus* in this Court, *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60, fn. 2 (1981). Moreover, the issue was not raised in the certiorari petition, and thus is not properly before the Court, Supreme Court Rule 34.1(a), *F.D. Rich Co.* v. *United States, Industrial Lumber Co.*, 417 U.S. 116, 121, fn. 6 (1974); *Namet* v. *United States*, 373 U.S. 179, 190 (1963). When an issue has not been raised in the lower courts, is not raised in the certiorari petition, and is objected to by respondent, it is inappropriate for this Court to consider such question,

Springfield, Mass. v. *Kibbe*, 480 U.S. 257 (1986) (*per curiam*).

This is not one of those "exceptional cases" in which the Court should decide an issue neither pressed nor passed upon by the courts below, *see*, *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940). This is particularly true when reviewing a state criminal conviction in which issues of comity dictate that this Court not reach issues never asserted in state court, *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983). While this case technically comes to this Court from the United States Court of Appeals which reviewed the state conviction on habeas corpus, the considerations governing review of a state court conviction are the same as in *Gates*. Those considerations include: (1) the state court record is not well developed on the point; (2) the state courts should be afforded the opportunity to first consider the legality of state officers' conduct; and (3) the state courts should be allowed to determine whether the rights accorded a criminal defendant should be broader under independent state law than under federal law[2], 462 U.S. at 221-222.

This case does not present a case of such "plain error" as to warrant the unusual step of deciding an issue not raised in the lower courts, not presented in the certiorari petition, nor urged by either party, or even *amicus*, *see generally*, Robertson, *Jurisdiction of the Supreme Court*

[2] Consideration of the "custody" question here is particularly inappropriate in view of the Indiana appellate court decisions considering the "custody" question in the context of these precise warnings and under circumstances closely analogous to the factual circumstances in the case at bar, *see*, *Dickerson* v. *State*, 257 Ind. 562, 276 N.E.2d 845, 847-848 (1972) (same *Miranda* warnings); *Johnson* v. *State*, 484 N.E.2d 49, 51 (Ind. App. 1985) (similar factual context.)

of the United States, § 418, pp. 835-840 (1951); Stern, Gressman, Shapiro, *Supreme Court Practice*, § 6.26, pp. 363-368 (6th ed. 1986). Generally this Court has limited its discretion to notice a "plain error" to those unusual circumstances where the errors "seriously affect the fairness, integrity, or public reputation of public proceedings," *Connor* v. *Finch*, 431 U.S. 407, 421, fn. 19 (1977).

A review of the decisions of the Indiana Supreme Court, United States District Court, and Seventh Circuit all reveal that "custody" was assumed for the purposes of this case. This assumption is not questioned in this Court by Petitioner. While this Court may have the discretion to consider the question of custody, the more established principle is to "take the case as it comes to" the Court and review the questions decided in the state courts, decided in the courts below, raised in the petition, and briefed by both the parties and the Solicitor General, *United States* v. *Leon*, 468 U.S. 897, 905 (1984). There is no occasion presented by this case to consider whether Eagan was "in custody" at the time of his first statement.

2. Respondent Was Clearly "In Custody" At The Time Of His First Statement.

Miranda applies only to custodial interrogations, 384 U.S. at 444. Respondent submits that, should this Court consider the "custody" issue, the record clearly demonstrates that his first statement was the result of a custodial interrogation. This Court has made clear that the question of "custody" is objective: Was the suspect actually in custody, *Beckwith* v. *United States*, 425 U.S. 341, 347 (1976); *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*). In order to constitute "custody", the restraint on a suspect's freedom must be to the degree

associated with a formal arrest, *Minnesota* v. *Murphy*, 465 U.S. 420, 430 (1984). Thus if the suspect was actually allowed to leave following the interrogation, he was not "in custody," regardless of the circumstances of the interview, *California* v. *Beheler*, 463 U.S. 1121 (1983) (*per curiam*).

In the instant case the preprinted waiver form signed by Respondent prior to his first statement (J.A. 133) stated that he was not under arrest and that he could leave the officers' office if he wished. This boilerplate language aside, it is apparent from the facts of this case that Eagan was indeed "in custody" at the time of this first statement.

The Hammond police first had contact with Respondent at the crime scene at approximately 8:00 a.m. on May 17, 1982 (J.A. 101). From that point on Respondent was with police officers at all times until he was formally charged with these offenses. His first statement was given at 11:14 a.m. on the 17th, while his second statement was given the following afternoon, after Eagan had been held in custody overnight. At the time Eagan first had contact with the Hammond police, the authorities already knew that the victim of the crime, when found by Chicago police, had asked Eagan: "Why did you stab me?" (SCR 207). By this time the police were also aware of certain discrepancies in the story Respondent originally told them, which they believed inconsistent with established facts (SCR 176). The Hammond police then asked Eagan if he would come to the police station so they could obtain a statement (J.A. 103). The officers transported Respondent from the crime scene to the station (J.A. 103). Before taking the first statement, the police discovered blood stains on and in Respondent's car and asked Eagan's permission to take samples (SCR 166, 228). It was at this

point that Eagan was given the first set of warnings and gave an exculpatory statement.

Lower courts have struggled to apply this Court's decisions regarding custody in the *Miranda* context, *see generally*, Nissman, Hagen, and Brooks, *Law of Confessions*, § 4:10, pp. 98-102 (1985). After *Berkemer* v. *McCarthy*, 468 U.S. 420 (1984), however, it is clear that the proper question is not whether a reasonable person would believe he was not free to leave, but whether such a person would believe he was in police custody of the degree associated with formal arrest. In answering this question, courts will look to the location of the interrogation, whether the suspect was confronted by several officers instead of just one, whether the interrogation took place in front of the suspect's friends or other third parties, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation, 1 W. LaFave & J. Israel, *Criminal Procedure*, § 6.6, pp. 494-499 (1984) (cases collected), *United States* v. *Streifel*, 781 F.2d 953, 961 (1st Cir. 1986).

Applying these criteria to the instant case, we find that the interrogation occurred at the Robertsdale police station, after Respondent had been transported by the police from the crime scene to the station house. The interrogation was conducted by two officers, with only the Respondent present. Additionally, and most importantly, Eagan was actually in custody at all times after his initial contact with the police. He was transported by the Hammond police to the police station in the early morning hours of May 17, 1982; Eagan was interrogated by police for between two and three hours before he gave his first statement; he was confined all day on May 17th, held overnight, and he was confined until the late afternoon of May 18th, at which point he was again interrogated.

Respondent submits that these facts belie any assertion that he was not in custody when he gave the first statement.

It is significant that the Indiana Supreme Court, reviewing a statement obtained after the accused signed *exactly the same waiver as involved in this case*, determined that the suspect was "in custody" for *Miranda* purposes even though he had come to the police station voluntarily, on unrelated business, at which time the police initiated the interrogation, *Dickerson* v. *State*, 276 N.E.2d at 847-848. A more recent Indiana decision involved a defendant who voluntarily went to the police station at the request of the police after he was identified by the victim of child molestation. He too was questioned in a police interview room at the police station. Under these circumstances, following *Dickerson*, the Indiana Appellate Court found that the defendant was actually "in custody" at the time of the interrogation regardless of the voluntary nature of his arrival, *Johnson* v. *State*, 484 N.E.2d at 51.

This is consistent with the decision of the New Jersey Superior Court (Appellate Division) in which a defendant who voluntarily submitted to an interrogation and was told that he was not under arrest and could terminate the interview at any time and leave was still "in custody" within the meaning of *Miranda*, *State* v. *Micheliche*, 220 N.J. Super. 532, 533 A.2d 41, 42-43 (1987). The New Jersey Court reasoned that regardless of what the defendant was told, the facts of the case indicated that the suspect was actually "in custody" and was not free to leave. At the time of the interrogation the police knew that Micheliche had been implicated in the murder, was present at the time of the crime, and had lied about various matters.

The result here is the same. When the police took Eagan to the Robertsdale station they already knew that the victim had identified him as her assailant and that his initial statement was inconsistent with known facts. By the time the interrogation began the police knew that there were blood stains in and on Eagan's automobile. After the interrogation—even though Respondent gave an *exculpatory* statement—Eagan was held in custody. Under all of the facts, Respondent clearly was "in custody" at the time of the initial interrogation, and the authorities were therefore obligated to comply with the dictates of *Miranda*.

B. The Warnings Given Respondent Prior To His First Statement Violated *Miranda* By Conditioning His Right To Counsel On His Appearance In Court After Police Interrogation.

1. *Miranda* Explicitly Requires That Counsel Be Provided An Indigent Suspect Or Be Properly Waived Prior To A Custodial Interrogation.

The problem with the admonitions given to Eagan prior to his first statement is that after the police first told him that he had the right to counsel prior to and during the interrogation and that he had such right even if he could not afford to hire an attorney, he was then told: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." (J.A. 134). The majority of the Seventh Circuit found the warning improper because:

> The "if and when" language limits and conditions an indigent's right to counsel on a future event. The warning suggests erroneously that only those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait. This lan-

guage further implies that if the accused does not "go to court", i.e. the government does not file charges, the accused is not entitled to an attorney at all.

Thus, this warning is constitutionally defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation.

(J.A. 8).

Respondent submits that this analysis is correct and the judgment of the Court of Appeals should be affirmed.

There is no ambiguity in Chief Justice Warren's opinion for the Court in *Miranda* on an indigent's right to have counsel present at a custodial interrogation. After delineating the Fifth Amendment right to counsel established in *Miranda*, the Chief Justice turned to the implementation of this right for persons who could not afford to retain an attorney. The Court concluded that the denial of counsel to an indigent person at a custodial interrogation would be unsupportable and illogical. The Chief Justice then considered the warnings that were to precede a custodial interrogation of a person who could not afford a lawyer:

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.

384 U.S. 473 (footnote omitted).

Respondent submits that the warnings provided him prior to his first statement did not comply with this specific directive of *Miranda*. The warnings informed Respondent that he could not actually have an attorney at the time of the interrogation, but that he had to wait until his case came to court. If his case did not get to court; he could not get an attorney. These warnings were not the type of clear statement of rights anticipated by this Court in *Miranda*.

Petitioner and the Government of the United States advocate a direct and substantial repudiation of the rights specifically established in *Miranda* in favor of a rule that if the admonitions "touch all points required by the *Miranda* decision" (*Amicus Brief*, p. 10), the warnings are valid regardless, apparently, of how ambiguous, inconsistent, and unclear the instructions are or whether additional information is added to the warnings which essentially negates the rights to which the suspect is entitled. That is not what this Court required in *Miranda* itself. The Court held that it was not enough to tell the suspect that he could obtain appointed counsel when his case went to court or that he could have a lawyer present if he had, or could retain, one. Certainly no basis has been shown in this record or in the briefs of counsel to warrant reconsideration of this basic principle which has existed for more than twenty years.

While Petitioner denigrates the judgment of the Court of Appeals as "formalistic" and "hyper-technical" *Brief for Petitioner*, at i), the fact of the matter is that in *Miranda* the Court was emphatic in securing the right to pre-

interrogation counsel for indigents and requiring warnings which adequately inform the suspect of this right. Although it is true that this Court has made clear that no precise formulation of the *Miranda* warnings is required, *California* v. *Prysock*, 453 U.S. 355, 359 (1981) (*per curiam*), the warnings given here are improper because they misstate the suspect's right to counsel under *Miranda* and connect the right to appointed counsel to an event after the interrogation. For this reason the instant admonitions were invalid, and Respondent's first statement should have been suppressed.

2. Although Lower Courts Have Disagreed On The Validity Of The "If And When" *Miranda* Warnings, The Majority Of The Courts Have Held Such Admonitions Invalid, And Such A Result Is Clearly Required After This Court's Decision In *Prysock*.

a. Prior To *Prysock* The Majority Of Courts Held The "If And When" *Miranda* Warnings To Be Invalid.

Prior to obtaining Respondent's first statement, the Hammond police informed him that he had the right to speak to a lawyer for advice before the interrogation, to have counsel present during the questioning, and that he had "this right to the advice and presence of a lawyer even if [he] cannot afford to hire one." The advice of rights continued: "We have no way of giving you a lawyer, but one will be appointed, if you wish, if and when you go to court." Thus the primary questions in this case are whether the latter language linked Respondent's right to counsel to a future event occurring after the interrogation thus violating *Miranda*, as construed by this Court in *Prysock*, 453 U.S. at 360, and whether the information imparted to Respondent regarding his right to counsel was so ambiguous as to constitute a denial of that right.

This precise question has been the subject of extensive litigation, and the courts have split on the propriety of such warnings. The majority of courts which have considered the validity of similar *Miranda* warnings have found them to be fatally defective because they condition the suspect's right to counsel on his appearance in court and because such warnings are ambiguous: first explaining a present right to counsel, but then informing the suspect that counsel can not actually be provided until a later time. Thus the majority of state appellate courts have found such warnings to violate *Miranda*, *Brown* v. *State*, 396 S.2d 137 (Ala.App. 1981); *State* v. *Cassell*, 602 P.2d 410 (Alaska, 1979); *Moore* v. *State*, 251 Ark. 436, 472 S.W.2d 940 (1971); *People* v. *Clark*, 2 Cal.App.3d 510, 82 Cal.Rptr. 393 (1969); *Brooks* v. *State*, 229 A.2d 833 (Del. 1979); *Cribbs* v. *State*, 378 S.2d 316 (Fla.App. 1980); *State* v. *Grierson*, 95 Ida. 155, 504 P.2d 1204 (1972) (dictum); *State* v. *Carpenter*, 211 Kan. 234, 505 P.2d 753 (1973); *State* v. *McBroom*, 394 N.W.2d 806 (Minn.App. 1986); *State* v. *Dess*, 184 Mont. 116, 602 P.2d 142 (1979); *State* v. *Robbins*, 4 N.C.App. 463, 167 S.E.2d 16 (1969); *Commonwealth* v. *Johnson*, 484 Pa. 349, 399 A.2d 111 (1979); *State* v. *Creach*, 77 Wash.2d 194, 461 P.2d 329 (1969).

Fewer states have found such admonitions to be valid, *State* v. *Mumbaugh*, 107 Ariz. 589, 491 P.2d 443 (1971); *State* v. *Maluia*, 56 Hawaii 428, 539 P.2d 1200 (1975); *People* v. *Williams*, 131 Ill.App.3d 149, 264 N.E.2d 901 (1970); *Emler* v. *State*, 259 Ind. 241, 286 N.E.2d 408 (1972); *State* v. *Sterling*, 377 S.2d 58 (La. 1979); *People* v. *Campbell*, 216 Mich.App. 196, 182 N.W.2d 4 (1970), *cert. denied*, 400 U.S. 945 (1971); *Harrell* v. *State*, 357 S.2d 643 (Miss. 1978); *People* v. *Swift*, 32 A.D.2d 183, 300 N.Y.S.2d 639 (1969), *cert. denied*, 396 U.S. 1018 (1970); *Arnold* v. *State*, 548 P.2d 659 (Okla. Crim. 1976); *Grennier* v. *State*, 70 Wis.2d 204, 213-215, 234 N.W.2d 316 (1975).

The circuits are also split on the propriety of these admonitions. In the Seventh Circuit, in which this case arises, the law was settled in *United States ex rel. Williams* v. *Twomey*, 467 F.2d 1248 (7th Cir. 1972), wherein the Court of Appeals found the instruction was "not an 'effective and express explanation'" of the suspect's *Miranda* rights and was "equivocal and ambiguous," 467 F.2d at 1250. In *United States ex rel. Placek* v. *State of Illinois*, 546 F.2d 1298 (7th Cir. 1976) the Seventh Circuit reaffirmed *Williams*, but upheld a warning which stated that counsel would be "appointed through the court" without reference to any future event which might occur after the interrogation. The instant statement, involving exactly the same language as in *Williams*, was obtained ten years after that seminal decision in the circuit.

The Second and Fourth Circuits have refused to overturn convictions based on substantially similar *Miranda* warnings, *Massimo* v. *United States*, 463 F.2d 1171 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973); *Wright* v. *North Carolina*, 483 F.2d 405 (4th Cir. 1973), *cert. denied*, 415 U.S. 936 (1974). The Fifth and Ninth Circuit have split on the issue, both upholding and rejecting the specific language involved in this case, *compare*, *Gilpin* v. *United States*, 415 F.2d 638 (5th Cir. 1969) with *United States* v. *Lacy*, 446 F.2d 511 (5th Cir. 1971), and *United States* v. *Garcia*, 431 F.2d 134 (9th Cir. 1970) with *United States* v. *Noa*, 443 F.2d 144, 146 (9th Cir. 1971).

The Tenth Circuit, in reversing a conviction, noted:

> . . . we think the sentence: "we have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court" immediately following a statement of a present right to retained and

> appointed counsel is likely to confuse an unsophisticated mind.

Sullins v. *United States*, 389 F.2d 985, 988 fn. 2 (10th Cir. 1968). The *prior* decision relied upon by Petitioner (*Brief*, pp. 12-13), *Coyote* v. *United States*, 380 F.2d 305, 307 (10th Cir. 1967), *cert. denied*, 389 U.S. 992 (1967) was not dealing with the same type of admonitions involved in this appeal.

The First, Third, Sixth, Eighth[3], and District of Columbia Circuits have not dealt with the precise issue raised in this case.

The difference of opinion between those courts which have upheld and struck down the admonitions can be seen by comparing the decisions of two circuits faced with virtually the same language as the warnings involved here. In *Gilpin*, Judge Wisdom reviewed the rule of *Miranda*, noting that the warning must "convey to the accused that he is entitled to a government-furnished counsel here and now," 415 F.2d at 639, *quoting*, *Lathers* v. *United States*, 396 F.2d 524, 525 (5th Cir. 1968). The Fifth Circuit concluded that the contested language:

> . . . did not indicate that Gilpin had a right to have an appointed counsel *during the interrogation*. Indeed, a fair interpretation of the detective's statements is that Gilpin would be given a lawyer *only if he should go to court*. The defendant may have had the impression that a lawyer would be appointed only if he pleaded not guilty. In any event, the statement con-

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[3] The Eighth Circuit case relied upon by Petitioner, *Klinger* v. *United States*, 409 F.2d 299 (8th Cir. 1969), *cert. denied*, 396 U.S. 859 (1969) did not involve a *Miranda* warning which conditioned the right to counsel on some future event, *i.e.*, counsel would only be provided "if and when" the suspect went to court.

> veyed no notion that he was entitled to a lawyer then and there.

415 F.2d at 640-641, (original emphasis).

The contrary reasoning is found in the Second Circuit's decision in *Massimo*, again dealing with identical warnings:

> . . . Massimo was clearly warned that he could have a lawyer present *during* questioning. The only conclusion Massimo would have been justified in reaching on the basis of the warning was that, since he was clearly entitled to have a lawyer present during questioning and since no lawyer could now be provided, he could not now be questioned.

463 F.2d at 1174 (original emphasis).

While it is certainly possible to engage in an extended semantical debate over the meaning of the "if and when" warnings, "[i]t cannot seriously be maintained that the pretzel-like warnings here—intertwining, contradictory, and ambiguous as they are—gave [Respondent] 'a better understanding of his constitutional rights' than a straightforward recitation of those rights would have," *Commonwealth* v. *Johnson*, 399 A.2d at 115, *quoting*, *Commonwealth* v. *Singleton*, 439 Pa. 185, 190, 266 A.2d 753, 755 (1970). "Although there is no talismanic or heraldic abracadabra which must be fulfilled, the offer of counsel must be clarion and firm, not one of mere impressionism," *Lathers* v. *United States*, 396 F.2d at 535.

Those courts which have found that the "if and when" instruction adequately conveys to a suspect his right to counsel are seriously overestimating the intellectual sophistication and comprehension of the average individual taken into custody for questioning. All of the empirical data on this question suggest that a high percentage of

suspects who are given *correct Miranda* warnings do not understand what they have been told[4]. If suspects have difficulty understanding the correct warnings, how can they be seriously expected to understand the admonitions at issue in this case? While a judge or attorney familiar

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[4] One study found that more than 57% of all adults, and 79% of all juveniles could not entirely understand the traditional *Miranda* warnings. Significantly, the instruction *least* understood by both adults and juveniles was the right to have counsel present at the interrogation. Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif.L.R. 1134, 1152 (table) (1980). These data are discussed in greater detail in Grisso, *Juveniles' Waiver of Rights*, (St. Louis, 1981), p. 74. Another study of juveniles found that 81 of 86 of the juveniles interviewed did not consciously and fully understand their rights. Ferguson and Douglas, *A Study of Juvenile Waiver*, 7 San Diego L. R. 39, 53-54 (1970). This lack of comprehension extended to adults examined in a Denver study in which a group of suspects read or were read correct *Miranda* warnings prior to the interrogation. Only 40% of the suspects interviewed could remember both their Fifth and Sixth Amendment rights at the time of the interview, while 21% remembered only the right to remain silent, and 8% remembered the right to counsel. Leiken, *Police Interrogation in Colorado: the Implementation of Miranda*, 47 Denver L.J. 1, 14-15 (1970). In the District of Columbia 15% of eighty-five post-*Miranda* defendants failed to understand the right to silence warning, 18% failed to understand the warning of the right to presence of counsel, and 24% failed to understand the warning of the right to appointed counsel. Medalie, Zeitz, and Alexander, *Custodial Police Interrogation in our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347, 1374 (1968). Nor is this lack of comprehension limited to poorly educated suspects. In a study of Yale University graduate students, interrogated by the FBI after a 1967 demonstration, only two of the twenty persons interviewed mentioned either *Miranda* or *Escobedo* spontaneously, and no one seemed to know what was involved in a waiver of rights, although each had been given the correct *Miranda* warnings by the FBI. Griffith and Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L. Rev. 318 (1967).

with the requirements of *Miranda* may be able to understand the meaning of the contradictory instructions given Eagan[5], the typical person subjected to a custodial interrogation lacks the ability to understand clearly the right to counsel from the instructions given[6].

b. This Court's Decision In *Prysock* Teaches That These *Miranda* Warnings Are Invalid Because They Condition The Assistance Of Counsel On An Event Occurring After The Interrogation.

In *California* v. *Prysock*, 453 U.S. 355 (1981) the defendant was advised of his *Miranda* rights but was not specifically told of his right to have an attorney appointed before questioning. The California Court of Appeals reversed the conviction, relying on two earlier California appellate decisions, *People* v. *Bolinski*, 260 Cal.App.2d 705, 67 Cal.Rptr. 347 (1968) and *People* v. *Stewart*, 267 Cal.App. 2d 366, 73 Cal. Rptr.484 (1968).

The majority of this Court found that the warnings given Prysock were sufficiently complete to comply with *Miranda* and thus reversed the judgment of the Califor-

[5] The American Bar Association Standards provide that "[t]he offer [of counsel] should be made in words easily understood, and it should be stated expressly that one who is unable to pay for adequate representation is entitled to have it provided without cost," ABA, *Standards of Criminal Justice*, Standard 5-7.1 (1982).

[6] One commentator has observed: "Would not the ordinary accused, under the emotional stress of recent detention by the police, be confused as to the meaning of a warning which informed him: 'that he was entitled to have an attorney with him during questioning and that one could be appointed for him, but not until he went into court, and that he could answer questions in advance of such appointment?'" Comment, *Criminal Procedure: Miranda Warning and the Right to "Instant Counsel"—A Growing Schism*, 29 Okla. L.R. 957, 965-966 (1976).

nia court. In so doing the Court cited with approval the decisions of the Ninth Circuit in *United States* v. *Garcia*, 431 F.2d 134 (9th Cir. 1970) and of the California Court of Appeals in *Bolinski*. The Court found that the results in those cases were correct because "the reference to appointed counsel was linked to a future point in time after police interrogation, and therefore did not fully advise the suspect of his right to appointed counsel before such interrogation," 453 U.S. at 360.

In *Garcia* the defendant was informed that she had the right to counsel "when she answered any questions," while on another occasion she was told that "she could 'have an attorney appointed to represent [her] when [she] first appeared before the U.S. Commissioner or the Court.'" In *Bolinski* an FBI agent[7] informed the defendant that he had the right to counsel "if he was charged," which would be provided at no cost to him if he was unable to afford counsel.

In *Prysock* this Court also approved of the reasoning of the Ninth Circuit in *United States* v. *Noa*, 443 F.2d 144 (9th Cir. 1971) wherein the defendant was given the standard *Miranda* admonitions with the additional advisement that if Noa could not afford counsel "one will be appointed for you if you wish." The Ninth Circuit upheld these instructions, and distinguished the case from *Garcia*, pointing out that in *Garcia* the right to counsel was linked to a future event (appearance before the Commissioner or court), while in *Noa* no such future event was suggested, only that counsel would be appointed. In both *Garcia* and *Noa* the Court of Appeals cited the Fifth

[7] The Federal Bureau of Investigation stopped using the "if and when" warnings sometime in 1968 or 1969, *see United States* v. *Cassell*, 452 F.2d 533, 541, fn. 8 (7th Cir. 1971).

Circuit's decision in *Gilpin* as indicative of the type of warnings which did not comply with *Miranda*. The warnings in *Gilpin* were *identical* to those given Eagan, *see*, 415 F.2d at 639.

Prysock requires that the judgment of the Seventh Circuit be affirmed. Without question the warnings given Eagan linked his right to counsel on his future ("if and when") appearance in court. To hold otherwise is to do violence to the straight-forward meaning of the words spoken by the officers prior to Eagan's first statement. Significantly, Petitioner does not even cite *Prysock* in his brief, while the *Amicus* Brief (p. 18) attempts to draw a distinction between those warnings which "link the appointment of counsel to a future event occurring after interrogation" which are not proper, and those which "simply link the appointment of counsel to some future event" which are valid.

A review of *Prysock* itself, as well as those cases cited therein and decided thereafter, demonstrate the defect in the warnings given Eagan was that they clearly connected his ability to obtain counsel to something which would occur after the interrogation. The exquisite distinction in language suggested by the Solicitor General to save these admonitions finds support in none of the cases deciding this issue. Just as in *Bolinski*, *Garcia*, and *Gilpin*, here Eagan was told he could not obtain the services of an attorney until and unless he appeared in court. Indeed, inclusion of the word "if" in the instructions clearly means that Eagan had no right to an attorney at the time of the interrogation, but that such right was conditioned on his case coming to court.

Of particular interest is a post-*Prysock* cases dealing with this issue, *United States* v. *Contreras*, 667 F.2d 976

(11th Cir. 1982), *cert. denied*, 459 U.S. 849 (1982). Petitioner contends (*Petitioner's Brief*, p. 13) that *Contreras* is contrary to the decision of the Court of Appeals in this case. A complete reading of the decision, however, reveals that it supports the action of the Seventh Circuit. In *Contreras* the accused was informed only that counsel would be appointed by the court. The Eleventh Circuit considered the impact of this Court's decision in *Prysock* on *Miranda* warnings which informed the defendant that counsel would have to be appointed by the court. On page 13 of the Petitioner's Brief the State quotes some of the Eleventh Circuit's reasoning. Immediately following the quoted language, however, the court said:

> *Prysock* thus stands for the proposition that a *Miranda* warning is adequate if it fully informs the accused of his right to consult with counsel prior to questioning and *does not condition the right to appointed counsel on some future event*. (emphasis added)

667 F.2d at 979. Following this observation is a footnote which gives as examples of *improper* warnings a statement that counsel would be available "if" the suspect went to court, *citing*, *Garcia*, *Gilpin*, and *Bolinski*, 667 F.2d at 979, fn. 5. It is thus apparent that the Eleventh Circuit would find the instant warnings to be conditional and, thus, invalid.

Further support for Respondent's position is found in the Minnesota Court of Appeals decision in *State* v. *McBroom*, 394 N.W.2d 806 (Minn.App. 1986) wherein the defendant was told of his right to have a lawyer with him during any questioning and, if he could not afford counsel, one would be appointed by a judge "if you appear in court," 394 N.W.2d at 812. Citing *Prysock* and *Garcia*, the Minnesota Court found that the words "if you appear

in court" linked the right to counsel to some future event after the police interrogation, and thus the warning was not proper.

In *De La Rosa* v. *Texas*, 743 F.2d 299 (5th Cir. 1984), *cert. denied*, 470 U.S. 1065 (1985) the suspect was told that although "it will take some time" before a lawyer would be appointed, "the court will appoint a lawyer for you free of charge now or at any other time," 743 F.2d at 302. The Fifth Circuit found that the language of the warning made clear to De La Rosa that he had the right to counsel before he said a word. The Court distinguished *De La Rosa* from *Gilpin* where, as noted above, the instructions were identical to those in this case. In *Gilpin* the right to counsel was linked to a future event, while in *De La Rosa* the defendant was clearly informed of his right to have counsel appointed prior to the interrogation.

These cases stand for the proposition[8] that a *Miranda* warning which informs a suspect that counsel can not be provided unless ("if") some event occurs in the future are invalid. Contrary to the assertion of the Solicitor General, in *Prysock* this Court concluded that it is improper to tell a suspect in custody, immediately prior to an interrogation, that counsel can not be provided until he appears in court. Moreover, the conditional right to counsel indicated by the use of the word "if" manifestly fails to inform the

[8] The Solicitor General argues (*Amicus* Brief, pp. 9-11) that since the warnings given the Petitioner "touched all points required by the *Miranda* decision," such admonitions were proper. As the foregoing argument makes clear, in *Prysock* this Court explicitly found that otherwise proper warnings were rendered invalid by conditioning the right to counsel on an event which would occur after the interrogation. By limiting the right to counsel in this way the warnings "did not fully advise the suspect of his right to appointed counsel before such interrogation," 453 U.S. at 360.

suspect of a right to publicly compensated counsel at the interrogation[9], prior to the appearance in court. Respondent submits that under the clear application of *Prysock*, the warnings given to Eagan before his first statement did not comply with *Miranda* and were invalid.

C. Respondent Advocates Neither A Right To "Instant Counsel" Nor "Counsel On Call", But The Jurisdiction Must Have Some Procedure For Complying With *Miranda*.

It is entirely proper under *Miranda* for a jurisdiction to require a court to appoint counsel to represent a suspect at a custodial interrogation. The Seventh Circuit's decision in *Placek*, as well as the post-*Prysock* decisions of the Eleventh and Fifth Circuits in *Contreras* and *De La Rosa*, all are examples of cases in which the *Miranda* warnings were upheld, notwithstanding the fact that the accused was told that counsel could only be provided by court appointment. The problem is not the manner in which counsel is provided, but whether the suspect is informed of his ability to obtain counsel at the time of the interrogation.

It is not accurate to portray Respondent's argument as a demand for "instant counsel" as suggested by Judge Coffey, dissenting in the Court below (J.A. 22) and by the Solicitor General (*Amicus* Brief, p. 12), *citing Mayzak* v. *United States*, 402 F.2d 152, 155 (5th Cir. 1968). Respondent does not suggest that every police station have an attorney "on call" to provide representation at interroga-

[9] The Government acknowledges that the warning given to Eagan meant that he only had the right to counsel if charges were filed against him (*Amicus* Brief, p. 14). This warning, therefore, violates the explicit command of *Miranda* as well the rule established by *Prysock*.

tions. Each jurisdiction must decide how to implement *Miranda* in a manner which meets the unique needs of the state or community. Obviously, if counsel is requested, there will be some delay in getting the lawyer to the location of the interrogation, whether that be private counsel or a publicly compensated attorney. There is no *Miranda* violation when police inform the suspect that there will be a short delay in getting counsel to the station house, *People* v. *Evans*, 125 Ill.2d 50, ___, N.E.2d ___ (1988) No. 60705 (Ill. Sup. Ct. Sept. 29, 1988)

In Wisconsin, a jurisdiction with a statewide public defender program, there are specific administrative regulations which specify a procedure for providing counsel to an indigent at any time, whether that be a private lawyer or a staff public defender, Wis. Admin. Code § SPD 2.02(2) (1984)[10]. Prior to the creation of the statewide public defender program in Wisconsin, the local bar association in some communities prepared lists of attorneys who would represent indigent suspects at the interrogation stage, Milner, *The Court and Local Law Enforcement*, (Beverly Hills, 1971), pp. 213-214.

Indeed, contrary to the assertion found at page 12 of the *Amicus Brief*, in several jurisdictions the law enforcement officer has the ability—in some cases, the obligation—to obtain counsel for an indigent who invokes his right in a custodial interrogation. In Florida if an indigent suspect requests counsel, the officer "shall immediately and effectively place said defendant in communication with the (office of) Public Defender of the circuit in which

[10] The regulation provides:

> In any emergency situation, the representative of the state public defender shall assign the attorney most readily available to handle the emergency situation, whether that attorney is a staff public defender or private attorney.

the arrest was made," Rule 3.111(c)(2), Florida Rules of Criminal Procedure. In Vermont state law places the obligation on the law enforcement officer to notify the appropriate public defender if an indigent is in custody and does not waive counsel, Vt. Stat. Ann. tit. 13, § 5234(a)(2) (1988), while a Wyoming statute specifies that "[i]f the person being interrogated does not have an attorney and wishes to have the services of an attorney, he shall be provided the opportunity to contact the nearest public defender," Wyo. Stat. § 7A-6-105(a) (1987). North Carolina has a similar statute, N.C. Gen. Stat. § 7-353(c) (1986), placing the responsibility on the authority having custody of a suspect to notify either the public defender or court if the indigent requests counsel. In Alaska and Idaho the law enforcement officers are required to notify the public defender or court if someone is in custody who is not represented by counsel, Alaska Stat, § 18.85.110 (a)(2); Idaho Code § 19-853(a)(2) (1987). New Mexico law requires that the peace officer shall notify the district public defender of any person not represented by counsel who is in custody and is either charged with or under suspicion of the commission of a crime, N.M. Stat. Ann. § 31-15-12C (1978).

In the District of Columbia members of the bar volunteered for station-house duty to assist in assuring compliance with *Miranda*, Medalie et al., *Custodial Police Interrogation in our Nation's Capital: the Attempt to Implement Miranda*, 66 Mich. L. Rev. at 1380-1381. In Denver suspects who request counsel, but have no funds to retain an attorney, are allowed to call the public defender, Leiken, *Police Interrogation in Colorado: the Implementation of Miranda*, 47 Denver L. J. at 10. In Chicago if an indigent suspect indicates a desire to consult with an attorney, the police will halt the interrogation and

call the public defender, *see*, *People* v. *Evans*, *supra*. The California Supreme Court has recognized that although a court has the authority to determine indigency and appoint counsel, a public defender has the obligation to provide counsel to an indigent suspect at a custodial interrogation, even without the appointment of the court, *Ingram* v. *Justice Court for Lake Valley Jud. Dist.*, 73 Cal.Rptr. 410, 447 P.2d 650, 653 (1968).

In the federal system counsel is appointed by the Court, and pursuant to Rule 5(a), Federal Rules of Criminal Procedure, that appointment may come before the indictment or information is filed. The Criminal Justice Act, 18 U.S.C. §3006(a)(1), explicitly provides for the appointment of counsel prior to the filing of any pleadings, including counsel for the purpose of representing a suspect at a custodial interrogation, *Jett* v. *Castaneda*, 578 F.2d 842, 844 (9th Cir. 1978). In fact, the statute allows retroactive appointment of counsel to cover any representation provided prior to court appointment, 18 U.S.C. §3006(b).

None of these systems is specifically mandated by the Constitution[11], but each is a proper scheme to fulfill the mandate of *Miranda*[12].

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[11] The A.B.A. Standards recommend that: "At the earliest opportunity a person in custody should be effectively placed in communication with a lawyer. There should be provided for this purpose access to a telephone, the telephone number of the defender or assigned-counsel program, and any other means necessary to establish communication with a lawyer." ABA *Standards for Criminal Justice*, Standard 5-7.1.

[12] The importance of providing legal counsel as early in the case as possible is discussed in *Guidelines for Legal Defense Systems in the United States*, (National Legal Aid and Defender Association, 1976), Chapter 4, pp. 48-71.

The problem in this case is not that Indiana law and procedure require the appointment of counsel by the court, but that Indiana apparently has no procedure for securing counsel prior to the filing of a formal indictment or information, *see Amicus Brief*, p. 14, fn. 9. Thus, twenty-two years after the *Miranda* decision, the State of Indiana has no mechanism for providing counsel if an indigent suspect indicates his desire to consult with an attorney before submitting to questioning. As demonstrated above, there are many methods of complying with *Miranda*, from traditional court appointment, to statewide public defender systems, to private bar sponsored programs. Indiana provides none of these alternatives. Counsel is simply not provided.

This lack of any means to comply with *Miranda* places law enforcement officials in the untenable position of having to tell suspects that although they have the right to have an attorney present at the interrogation, there is no way to provide such a lawyer under Indiana law. It is no answer to say, as suggested by *Amicus (Brief*, pp. 12-13), that the instant warnings are acceptable because the police did nothing more than explain the Indiana procedure. An accurate description of a constitutionally deficient procedure does not make the procedure proper.

In Indiana law enforcement officials are unable to comply with *Miranda* by providing counsel to indigent suspects during custodial interrogation. As a consequence, the warnings afforded Eagan were fatally flawed as they expressly denied his right to have counsel present at the questioning and conditioned the provision of a lawyer on an event occurring after the interrogation. The Seventh Circuit properly directed that the first statement be suppressed.

II THE COURT OF APPEALS PROPERLY REMANDED THIS CASE TO THE DISTRICT COURT FOR DETERMINATION OF WHETHER THE RESPONDENT KNOWINGLY WAIVED HIS RIGHT TO COUNSEL PRIOR TO THE SECOND STATEMENT.

After giving the first statement, Respondent was held in police custody until the following afternoon. After 4:00 p.m. on May 18, 1982—approximately 29 hours after the first statement—Respondent confessed to hitting Ms. Williams on the head with a brick and stabbing her. Before giving this statement, Eagan was given a different set of *Miranda* than preceded his first questioning.

The Court of Appeals remanded the case to the District Court for determination of whether Respondent gave the second statement after a knowing and voluntary waiver of his constitutional rights (J.A. 9). Respondent submits that given the meager record properly before the Court and the inadequacies in both the first and second *Miranda* warnings, the decision to remand this case for additional findings must be affirmed.

A. Remand Is Appropriate So The District Court Can Properly Consider The Transcript Of The State Suppression Hearing Which Is Not Now Properly Part Of The Court Record.

A hearing on Respondent's motion to suppress his confessions was held in the Superior Court of Lake County, Indiana on November 19, 1982. The transcript of this hearing was not prepared until five years later, November 4, 1987 (J.A. 127), more than five months after this case was argued in the Seventh Circuit. The transcript was obviously never considered by either the Indiana Supreme Court or the District Court. It was never part of the District Court record at all. Moreover, the transcript was never properly made part of the record in the Court of

Appeals. Respondent submits that under these circumstances the purported suppression hearing transcript (J.A. 95-129) is not properly before this Court.

Prior to the appearance of this transcript the only indication in this record of the suppression hearing and its disposition was a one sentence minute order found at page 39 of the State Court Record. That order stated: "Evidence is heard and Arguments are had, and the Court being duly advised, now denies Motions to Suppress." It was on the basis of this record and the evidence adduced at trial that both the Indiana Supreme Court and the District Court denied relief to Respondent.

Respondent was provided no notice that the record had been supplemented by this transcript, nor was he provided a copy of the transcript until after this Court granted certiorari. His first knowledge of the existence of this document was when he read Judge Coffey's dissenting opinion which makes reference to such transcript (J.A. 10, fn. 1). The Court of Appeals issued no orders on this matter, the Petitioner never moved to supplement the record on appeal, and Respondent was never afforded the opportunity to object to the supplementation of the record with a transcript which had never been considered by either the state appellate court or the District Court.

Rule 10(e) of the Federal Rules of Appellate Procedure allows the Court of Appeals to correct an omission or misstatement in the record on appeal, but "the court of appeals may not admit on appeal a document that is not made part of the record in the district court," 9 *Moore's Federal Practice*, ¶ 210.08[2], p. 10-61. In this case it is not clear exactly how this transcript was added to the record on appeal, if it was. Judge Coffey's footnote says that ". . . with the aid and urging of this court's clerk, we have

recently been provided with the suppression hearing transcript" (J.A. 10, fn. 1). Petitioner's Brief indicates that this transcript was "submitted as a supplement to the record at the Circuit Court's (sic) request," *Petitioner's Brief*, p. 15. So far as Respondent knows, the record on appeal was never supplemented. No order was ever issued by the Seventh Circuit supplementing the record, and Respondent was never given notice of either the filing or nature of the supplementation. The majority of the Seventh Circuit panel made no reference to this transcript. In fact, Chief Judge Bauer, writing for the panel, noted the inadequacy of the record on this specific point (J.A. 9). The Seventh Circuit has construed Rule 10(e) to forbid the supplementation of a record on appeal with documents "which neither were introduced into evidence nor, in any manner, made a part of the record in the District Court," *United States ex rel. Kellogg* v. *McBee*, 452 F.2d 134, 137 (7th Cir. 1971); *Borden, Inc.* v. *F.T.C.*, 495 F.2d 785, 788 (7th Cir. 1974), *see also Stearns* v. *Consolidated Management, Inc.*, 747 F.2d 1105, 1116, fn. 1, (7th Cir. 1984) (Coffey, J., dissenting). Respondent submits that this document was never part of the original record on appeal and was never properly made part of the record. It should not be considered here[13].

[13] In *Dickerson* v. *Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982), *cert. denied*, 459 U.S. 878 (1982) the Court of Appeals in a § 2254 habeas corpus case did consider a portion of the state criminal court record which was not before the district court. *Dickerson* arises in a very different factual setting than does this case. In *Dickerson* the state objected to the Eleventh Circuit considering a portion of the state trial transcript which the attorney for the state had failed to make part of the record in the district court. The attorney for the prisoner relied on the missing transcript in his brief on appeal. The missing transcript had been before the state appellate court when reviewing Dickerson's conviction, and the Court of Appeals issued a formal order directing the submission of the transcript. Most importantly, in *Dickerson* the issue considered by the Court of Appeals was strictly a legal issue, while here a mixed question of law and fact is presented, *United States* v. *Yunis*, 859 F.2d 953, 958 (D.C. Cir. 1988); *Terrovona* v. *Kincheloe*, 852 F.2d 424, 428 (9th Cir. 1988).

This Court made clear long ago that an appellate court "can act on no evidence which was not before the court below, or receive any paper that was not used" in the lower court, *Boone* v. *Chiles*, 35 U.S. (10 Pet.) 177, 208 (1836). This concept is embodied in Rule 10(e), F.R.A.P. which allows supplementation of the record on appeal, but "does not grant a license to build a new record," *Anthony* v. *United States*, 667 F.2d 870, 875 (10th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982). Under Rule 10(e) it is improper to allow a party to supplement the record of the district court with documents never considered in the trial court, *Fassett* v. *Delta Kappa Epsilon (New York)*, 807 F.2d 1150, 1165 (3rd Cir. 1986), *cert. denied*, 107 S.Ct. 2463, 95 L.Ed.2d 872 (1987); *Karmun* v. *Commissioner of Internal Revenue*, 749 F.2d 567, 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 819 (1985).

The apparent availability of the suppression hearing transcript is further basis to affirm the judgment of the Court of Appeals remanding this case to the District Court for a determination "of whether the defendant knowingly and intelligently waived his right to the presence of an attorney during the second interrogation" (J.A. 9). The District Court is required to consider all of the facts and circumstances surrounding the confession to ascertain whether the waiver of rights was knowing and voluntary, *Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981). This newly available transcript should be considered by the District Court along with all other evidence in consid-

ering whether Eagan properly understood and waived his right to counsel before the second statement.

B. The Warnings Given Respondent Prior To His Second Statement Were Themselves Defective.

The warnings provided Respondent prior to the second statement did not inform him of his right to have publicly compensated counsel with him during the interrogation. Although Respondent recognizes that in *Prysock* this Court held that warnings which failed to inform the suspect of his right to the services of a free attorney before and during questioning were nevertheless adequate to comply with *Miranda*, the admonitions prior to Respondent's second statement deviated substantially from those approved in *Prysock* and are so ambiguous and disjointed as to fail to convey to Respondent a proper understanding of his *Miranda* rights.

The second *Miranda* warnings provided Respondent were divided into five paragraphs (J.A. 141-142):

> 1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

> 5. That if I cannot hire an attorney, one will be provided for me.

Respondent submits that the juxtaposition of the words "of my own choice" with information about the right to an attorney in paragraph two garbles the warnings to such a degree as to violate *Miranda*[14]. Moreover, the structure of these warnings obfuscates Respondent's right to a free lawyer during the interrogation. Paragraphs two and three of the warnings deal with the right to counsel at the interrogation. Not only do these paragraphs not inform the suspect of his right to a publicly compensated attorney during the questioning, the statement that the individual has the right to an attorney of his "own choice" clearly suggests that he would have to obtain his own attorney for the interrogation and one would *not* be provided. Paragraph four describes the right to discontinue the interrogation, with no mention of the right to counsel. The only advise regarding a free attorney is found in the fifth paragraph. This information makes no reference to the provision of counsel during the interrogation, but simply says "if I cannot hire an attorney, one will be provided for me."

Respondent acknowledges that both the Indiana Supreme Court and the United States Court of Appeals

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[14] Unlike the "if and when" *Miranda* warnings which have been the subject of extensive litigation in all parts of the country, the second set of warnings appear to be unique to Lake County, Indiana, *see*, *Richardson* v. *Duckworth*, 834 F.2d 1366 (7th Cir. 1987); *Maxwell* v. *State*, 408 N.E.2d 158 (Ind. App. 1980); *Jefferson* v. *State*, 399 N.E.2d 816 (Ind. App. 1980); *Robinson* v. *State*, 272 Ind. 312, 397 N.E.2d 956 (1979); *Gutierrez* v. *State*, 270 Ind. 639, 388 N.E.2d 520 (1979); *Grimes* v. *State*, 170 Ind.App. 525, 353 N.E.2d 500 (1976); *Sotelo* v. *State*, 264 Ind. 298, 342 N.E.2d 844 (1976); *Holguin* v. *State*, 256 Ind. 371, 269 N.E.2d 159 (1971).

for the Seventh Circuit have upheld these specific warnings, *Robinson* v. *State*, *supra.*; *Richardson* v. *Duckworth*, *supra*. Nevertheless he submits that even without reference to the earlier warnings, the second admonitions failed to comply with *Miranda*. In *Sotelo* v. *State*, Justice DeBruler, concurring, found that the Lake County warnings "do not clearly tell the person about to be questioned that if he has no money to hire a lawyer, one would be provided for him prior to any questioning," 342 N.E.2d at 851 (DeBruler, J., concurring). Adopting the reasoning of Sotelo's counsel, Justice DeBruler explained why the format of these warnings results in the failure to inform a suspect of the right to free counsel at the interrogation:

> Part of this deliberately calculated effect was achieved by adding the words "attorney of your own choice" to the first part of the advisement form. This would mean to many that they could have an attorney of their own choice to consult with them before they made a statement, just as it reads on the Lake County Waiver Form, but that this only applies to an attorney of their own choice, assuming they could afford one.

Justice DeBruler then noted that the information about the right to have an attorney provided is separated from the right to counsel at the interrogation by two paragraphs which would "naturally lead a person to believe that he may have an attorney appointed for him some time in the future, and not prior to the interrogation," *id.*

Respondent asserts that the second warnings are defective on their face and his second statement should have been suppressed for this reason. At the very least, the defect in the second admonitions is sufficient to require the District Court to determine whether Eagan actually understood and knowingly waived his right to counsel prior to making the incriminating statement.

C. Notwithstanding This Court's Decision In *Elstad*, Respondent's Confession Was Not Admissible.

1. The Second Statement Is Not Admissible Because The Second *Miranda* Warnings Were Not "Careful And Thorough" As Required In *Elstad*.

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985) the Court held that a statement obtained after "a careful and thorough administration of *Miranda* warnings" (470 U.S. at 310-311) was admissible, notwithstanding the fact that an earlier statement was obtained by the police without administration of *Miranda* warnings. In this case both Petitioner and *Amicus* argue that under *Elstad* the second statement given by Respondent was admissible, even if the initial statement was properly excluded because of the defect in the first set of admonitions. Respondent submits that *Elstad* can not save the second statement.

Underlying this Court's decision in *Elstad* was the uncontested fact that Elstad was given entirely correct *Miranda* warnings before providing the second statement. Thus much of Justice O'Connor's opinion for the Court dealt with the question of whether the second statement was somehow compelled by the first, non-Mirandized, statement. The majority of the Court found that the second statement was untainted and thus admissible.

In so doing, the Court emphasized that the warnings ultimately given to Elstad were "careful and thorough" (470 U.S. at 310), "undeniably complete" (470 U.S. at 314), and "clear and comprehensive" (470 U.S. at 315, fn. 4). It is apparent from the repeated emphasis on the scope and nature of the warnings given to Elstad before his second statement that the content of the warnings was important in deciding that the second statement was voluntary and not tainted by the first confession. This is

because "[t]he warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will,'" 470 U.S. at 311, *quoting*, *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963).

In the instant case the second *Miranda* warnings were anything but careful, thorough, complete, clear or comprehensive. The warnings were garbled, ambiguous, and unclear on the critical question of Respondent's right to free counsel at the time of his interrogation. While in *Elstad* the Court had no difficulty in finding the second statement admissible, following an understanding waiver of constitutional rights, no such conclusion can be reached in this case.

In neither the first nor second warnings was Eagan ever informed of his right to provided counsel at the interrogation. In the first warnings he was affirmatively told that the right to free counsel attached only when his case went to court. The second warnings, while not specifically saying that Respondent could only obtain counsel after the interrogation, were so structured as to obscure his right to free counsel before and during the questioning. The rule of *Elstad* is that once a defendant has given a statement which violates *Miranda* a subsequent confession may be admitted if the suspect "has been given the requisite *Miranda* warnings" 470 U.S. at 318. Here Eagan was not given the type of warnings referred to in *Elstad*, and as a consequence his second statement is not admissible.

2. The Combination Of The Two Sets Of *Miranda* Warnings Warrants At Least A Remand To The District Court, If Not Outright Vacation Of Respondent's Conviction.

Within a 29 hour period Respondent was given two sets of *Miranda* warnings by the Hammond police. The first

set of warnings indicated that counsel could not be provided until after the interrogation, while the second warnings failed to inform Eagan that he had the right to free counsel prior to and during the interrogation. Respondent submits that the combined effect of the two sets of warnings was to fail to provide him a clear statement of his right to an attorney, supplied by the state, before and during the questioning.

The case is similar to, but stronger than, *Gilpin* v. *United States*, *supra*. In *Gilpin* the defendant gave several statements. The first was preceded by exactly the same warnings as were provided Eagan before his initial statement. The result was suppression of the first statement. Gilpin was subsequently given "adequate *Miranda* warnings" (415 F.2d at 641) before his second confession. Nevertheless, the Fifth Circuit found that the second statement was not admissible because the second set of warnings were "given in a perfunctory manner without the slightest hint that it contained any information different from the one preceding it," 415 F.2d at 642. In the instant appeal, the second set of *Miranda* warnings was not "adequate". In fact, the second warnings were incomplete in the same area the first warnings were incorrect—the right to free counsel before and during the interrogation. In the first set of warnings Respondent's right to counsel was misstated, and, as noted by the Court of Appeals, "[t]he second warning did not explicitly correct this misinformation" (J.A. 9). Thus while the defendant in *Gilpin* was ultimately given warnings which informed him of the right to counsel at the interrogation, such warnings were never provided Eagan.

In *Elstad* the defendant first gave a statement without being informed to his *Miranda* rights. Later that same day, after a complete set of warnings, he gave a statement which this Court found admissible. In this case what the

police did was worse than had they given Eagan no warnings at all before his first statement. The initial admonitions materially misstated his right to counsel, and this misstatement was never corrected. Before the second statement could be admissible, the police at least had to correct the information given the day before that counsel could be provided only if and when his case came to court.

Had Eagan been given the standard *Miranda* warnings before his second statement, this would be a closer case. Neither of the warnings given Eagan were standard, both deviated from the traditional admonitions and substantially misstated Eagan's right to counsel. Contrary to the assertion of the Petitioner and *Amicus*, Respondent was never given the "fully effective equivalent" of correct and complete warnings, *Miranda*, 384 U.S. at 476. Given the fact that the two statements come but one day apart, the police were obligated under these facts, at a minimum, to fully comply with *Miranda* and inform Eagan that he had the right to free counsel at the interrogation. They never did that.

The only relief granted by the Seventh Circuit was to remand the case to the District Court to determine whether, given the two warnings, Eagan understood his right to counsel and knowingly and intelligently waived his constitutional right to have counsel before and during the interrogation. On the facts here, given the lack of a state court record, given that neither set of warnings was complete, given that Respondent was never informed of his right to have an attorney provided at the interrogation, and given the obligation of the court to consider all of the facts and circumstances surrounding the confession, the relief granted by the court below was quite modest. Respondent urges the Court to affirm that action.

CONCLUSION

For the reasons set forth herein, Respondent respectfully prays that the judgment of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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No. 88-317

IN THE

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October Term, 1988

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vs.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

I.

THE SEVENTH CIRCUIT'S DETERMINATION THAT EAGAN'S CONFESSIONS WERE NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY GIVEN IS IN CONFLICT WITH DETERMINATIONS OF THE U.S. SUPREME COURT AND A MAJORITY OF THE CIRCUIT COURTS ON THIS ISSUE

In formulating a caption to the first division of the argument section of his brief, Respondent clearly indicates his misunder-

standing of the issue at bar and the state of law in this area. First, there is nothing "defective [about a] *Miranda* warning which conditioned Eagan's right to counsel on appearance in court." (Respondent's Brief at 11). Second, Respondent's *right* to counsel was not conditioned on appearance in Court.

Respondent, Eagan, argues that "[P]etitioner and the government of the United States advocate a direct and substantial repudiation of the rights specifically established in *Miranda*." (Respondent's Brief at 17). This is simply incorrect. Rather, Petitioner Duckworth, and the Solicitor General stand four square in support of the principles elucidated in *Miranda* and its progeny, and are requesting this Court apply those principles, an act the Seventh Circuit did not perform.

Petitioner and Respondent are in agreement that advice of rights given an accused may not condition the appointment of counsel on some future event *after* interrogation. *California v. Prysock*, 453 U.S. 355 (1981). The disagreement between the parties arises over the effect of the specific language used.

The advice of rights read to and by Respondent states:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer. Joint Appendix at 133.

This advisement of rights consists of eight sentences, three which emphasize Respondent's right to refuse to answer at *any point* in the questioning. Two of the sentences of this advice of rights emphasize Respondent's right to an attorney "*before* we

ask you any questions," and to "*stop answering* at any time until you talk to a lawyer." One of the sentences explains Respondent's right to counsel even if he cannot afford one. The one sentence complained of containing the "if and when" language does not contain any language which conditions appointment of counsel on some point *after interrogation*, and certainly does not imply such when taken in context. It does not violate *Miranda* or *Prysock* to indicate appointment of counsel will take place at a future point in time.[1]

This Court in reviewing *Prysock* determined the Fifth Circuit erred in concluding an advisement of rights was deficient because it failed to *explicitly* inform the accused of his *immediate* right to counsel.

> Here, in contrast, nothing in the warnings given Respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed right to a lawyer in general, including the right "to a lawyer before you are questioned, . . . while you are being questioned, and all during questioning."
>
> 453 U.S. 355 at 360-361.

Contrary to this well reasoned approach, the Seventh Circuit in *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), has adopted formalistic and technical *per se* rules to proscribe specific language used in any advisement of rights. This type of approach was specifically condemned in *California v. Prysock*, 453 U.S. 355 at 359 (1981) as contrary to the spirit and intent of *Miranda* and yet it has again raised its ugly head in this cause.

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[1] See *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

Respondent also takes offense at Indiana's apparent lack of any procedural apparatus for appointment of counsel absent an appearance in Court. Yet respondent can point to no decision of this Court which requires any such procedure. Again, any requirement of this procedure was specifically disavowed in *Miranda*. (See, n.1 preceding page).

Respondent blandly asserts "Prior to *Prysock* the majority of courts held the 'if and when' *Miranda* warning to be invalid". (Respondent's Brief at 18). In support of this bold statement, Respondent directs the court's attention to the decisions of twenty three state courts and seven Circuit Courts. The reasoning and the research of Respondent is flawed for several reasons.[2] Ultimately it does not matter whether the majority of state courts or Circuit Courts have reached one determination or another. The question is whether the language of the advice of rights provided Eagan is constitutionally valid pursuant to *Miranda* and subsequent decisions applying the principles set out in *Miranda*. Petitioner believes the Seventh Circuit erred in concluding the advice of rights provided Eagan was constitutionally deficient[3].

[2]First, seven of the state court decisions cited by Respondent do not in fact support his position. The follwing cases relied upon by Petitioner are specifically contrary to Respondent's Position. *Brooks v. State*, 229 A.2d 833 (Del. 1979) (confession admitted based upon a totality of the circumstances); *State v. Carpenter*, 211 Kan. 234, 505 P.2d 753 (1973) (confession admitted based upon totality of circumstances); *State v. Grierson*, 95 Ida. 155, 504 P.2d 1204 (1972) (lineup procedure at issue, confession admitted)

In addition the following cases center on other issues. *State v. Creach*, 77 Wash.2d 194, 461 P.2d 329 (1969) (Advisement of rights was missing necessary language, no "if and when" issue); *State v. Cassell*, 602 P.2d 410 (Alaska 1979) (Advisement of rights was missing language, no "if and when" issue involved. Specifically, referred to *Gaudlow v. State*, 253 Ind. 270, 252 N.E.2d 788 (1969); *Cribbs v. State*, 378 S.2d 316 (Fla. 1988) (issue did not involve "if and when" language); *Moore v. State*, 251 Ark. 436, 472 S.W.2d 940 (1971) (reversed on other grounds with no comment on "if and when" language).

At page 19 of Respondent's Brief, Respondent makes the inaccurate statement "fewer states have found such admonitions to be valid" citing the decisions of ten jurisdictions. Petitioner would also add to the list of jurisdictions upholding the validity of the language at issue, or similar language. *Schlade v. State*, 542 P.2d 907 (Alaska 1973); *Brooks v. State*, 229 A.2d 833 (Delaware 1979); *State v. Carpenter*, 211 Kan. 234, 505 P.2d 753 (1975); *State v. Grierson* 95 Ida. 155, 504 P.2d 1204 (1972). Thus, fourteen state jurisdictions have upheld the language challenged by Respondent and six have not. Similarly, at the Federal level six circuit's have upheld this language and three have declined to do so. The error of Respondents allegation that the majority of Courts have struck down the language challenged in this case is obvious.

[3]Respondent's discussion of federal cases is likewise deficient. Respondent contends the Fifth Circuit has split internally having a decision both affirming and condemning the language at issue. This is not entirely true. The most recent decision of the Fifth Circuit, and thus the most persuasive in terms of precedential value is *United States v. Lacy*, 446 F.2d 511 (5th Cir. 1971) which supports petitioner.

Respondent's attack on Petitioner's reliance on *Cogote v. United States*, 380 F.2d 305, (11th Cir. 1967), *cert denied* 389 U.S. 899 (1969) is misplaced. Respondent contends *Cogote* concerned a "different type of admonition." While the specific language discussed in this case may have differed, the issue was precisely the same. The Court in *Cogote*, defined the issue as follows:

> "The specific complaint here is . . . that appellant was not informed with sufficient clarity of his right to a court appointed attorney at the time the statement was made. Thus, he seems to say in effect that at most the agent advised him only that he could talk to a lawyer before making the statement if he could afford to have one, and that the judge would appoint a lawyer when he came to trial if he could not afford one."

Id. at 307.

Likewise, Respondent's discussion of *Klingler v. United States*, 409 F.2d 299, (8th Cir. 1969), *cert. denied* 396 U.S. 899 (1969) is flawed. According to Respondent, *Klingler* does "not involve a *Miranda* warning which conditioned the right to counsel on some future event." (Respondent's Brief n.3 at 21). The specific language approved in *Klingler* included the following:

> that you do have the right to have an attorney appointed by the Court for you if you are *later* charged with a Federal offense.

Id. at 308

It certainly appears that this language is substantially similar to that Respondent complains of in the case at bar. In approving this language the Eighth Circuit cited with approval *Mayzak v. United States*, 402 F.2d 152 (5th Cir. 1968), which stated:

> "* * * The fact that the F.B.I. agent truthfully informed Mayzak that the F.B.I. could not furnish a lawyer until federal charges were proferred against him does not vitiate the sufficiency of an otherwise adequate warning. * * * *Miranda* * * *

Id. at 155.

If as Respondent has stated these cases do not involve a *Miranda* advisement conditioned on a future event then it is unclear why Respondent objects to the similar language in this case.

Respondent, at pages 21-22 of his brief, asserts the difference of opinion in the Circuits can best be observed by comparing two cases, *Gilpin v. United States*, 415 F.2d 638 (5th Cir. 1969), and *Massimo v. United States*, 463 F.2d 1171 (2nd Cir. 1971), *cert. denied*, 409 U.S. 1117 (1973). Petitioner submits that this is inadequate. When reviewing all of the cases which have discussed this issue, it becomes apparent the difference in result is determined by the difference in approach. Those state courts and Circuit Courts which have applied the "totality of the circumstances" standard, proper to this issue, have generally concluded the type of language complained of herein has not affected the admissibility of a confession. Those courts which have excluded confessions when the "if and when" language has been present have adopted a *per se* approach, which in essence has determined certain "magic words" automatically and in all circumstances render a confession inadmissible. This approach, followed by the Seventh Circuit and the other jurisdiction relied upon by Respondent, does not comport with the clear language or spirit of *Miranda* or its progeny.

II.
THE SEVENTH CIRCUIT ERRED IN DETERMINING THAT EAGAN'S SECOND STATEMENT WAS TAINTED BY AN INADEQUATE ADVISEMENT OF RIGHTS PRIOR TO HIS FIRST STATEMENT

It appears upon close inspection of Respondent's Brief that his actual argument is that no *Miranda* warning complies with the spirit and intent of *Miranda*. At page 23, n.4 of Respondent's Brief, Eagan spends a good deal of time referring to scientific studies which allegedly tend to indicate a substantial number of individuals do not understand any *Miranda* warning, no matter how clear. A logical extension of Respondent's argument is that no advice of rights is clear enough to be understood by an accused, thus, all confessions are inadmissible. This is a clear attack on *Miranda*. This attack on *Miranda* is made all the more clear at pages 41 through 44 of Respondent's Brief, where Respondent attacks the language of the second warning given him as being inadequate.

Respondent's semantical attack on the language of the second advice of rights is simply incorrect. Bereft of authority supporting his claim, Respondent admits the specific language used in the second advice of rights has been approved by the Indiana Supreme Court and the Seventh Circuit. In fact, Respondent's only attack on this second advisement of rights is the order in which the sentences were placed. This issue was addressed in *Prysock* and resolved against Respondent when this Court stated:

> "The Court of Appeals erred in holding that the warnings were inadequate simply because of the order in which they were given.

453 U.S. 355 at 361.

It is obvious from Respondent's arguments with regard to both the first and second advisement of rights that at best he is advocating a rigid technical semantic application of *Miranda* be followed. This position has been specifically rejected by this court on a number of occasions. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Oregon v. Elstad*, 470 U.S. 298 (1985). Alternatively, he argues that any advisement of rights is incapable of being understood thus, all confessions are rendered invalid.

Respondent Eagan's suggestion that this cause should be remanded to the District Court is without merit. First, the District Court denied Respondent's petition for writ of habeas corpus. It is unlikely, therefore, that a review of the supplemental transcript of the suppression hearing will result in any change in the District Court's determination of this issue. Further, the remand of this case is unnecessary and inefficient in that a decision on the legal adequacy of the first or second advisement of rights is dispositive of this case and can quite readily be made by this Court based upon the evidence before it. *Oregon v. Elstad*, 420 U.S. 298 (1985).

CONCLUSION

Based upon the foregoing reasons, Petitioner would respectfully urge this Court to reverse the decision of the

Seventh Circuit and affirm the decision of the District Court denying Eagan's Petition for Writ of Habeas Corpus and dismissing this cause of action.

Respectfully submitted,

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